COPY

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
AUG 7 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT

SHARI CLAPP,

Plaintiff,

vs.

HERMAN MEEKS and QUALITY WOOD PRODUCTS, INC.,

Defendants.

Case No. 95-C-360 B

ENTERED ON DOCKET
DATE AUG 9 1996

STIPULATION TO DISMISSAL WITH PREJUDICE

COMES NOW the Plaintiff and Defendants and stipulate to the dismissal of the above-styled and numbered cause with prejudice.

Respectfully submitted,

FRASIER, FRASIER & HICKMAN

By: _____
James J. Robertson OBA#16409
1700 Southwest Boulevard
P.O. Box 799
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and

CROWE & DUNLEVY

By: _____
Randall Snapp OBA#11169
321 South Boston, Suite 500
Tulsa, OK 74103-3313

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CAROL A. HOUSE aka Carrol House aka Carol Ann House aka Carol House formerly Carrol A. Garbey aka Carol Ann Garbey aka Carol Garbey; STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION; EMERGENCY MEDICAL SERVICES AUTHORITY of the City of Tulsa; OSTEOPATHIC HOSPITAL FOUNDERS ASSOCIATION dba Tulsa Regional Medical Center formerly Oklahoma Osteopathic Hospital; DWIGHT RINGOLD dba Ringold Bail Bonds; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma; SERVICE COLLECTION ASSOCIATION, INC., a corporation,

Defendants.

Civil Case No. 95 C 842B

FILED

AUG 8 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE 8-9-96

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 8 day of Aug., 1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, appears by Kim D. Ashley, Assistant General Counsel;

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the Defendant, EMERGENCY MEDICAL SERVICES AUTHORITY of the City of Tulsa, OSTEOPATHIC HOSPITAL FOUNDERS ASSOCIATION dba Tulsa Regional Medical Center formerly Oklahoma Osteopathic Hospital and SERVICE COLLECTION ASSOCIATION, appear by Mark W. Dixon; and the Defendants, CAROL A. HOUSE aka Carrol House aka Carol Ann House aka Carol House formerly Carrol A. Garbey aka Carol Ann Garbey aka Carol Garbey and DWIGHT RINGOLD dba Ringold Bail Bonds, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, CAROL A. HOUSE aka Carrol House aka Carol Ann House aka Carol House formerly Carrol A. Garbey aka Carol Ann Garbey aka Carol Garbey, signed a Waiver of Summons on August 30, 1995; that the Defendant, DWIGHT RINGOLD dba Ringold Bail Bonds, signed a Waiver of Summons on August 29, 1995; that the Defendant, OSTEOPATHIC HOSPITAL FOUNDERS ASSOCIATION dba Tulsa Regional Medical Center formerly Oklahoma Osteopathic Hospital, signed a Waiver Summons on October 4, 1995.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on September 13, 1995; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, filed its Answer on September 20, 1995 and a Response to the Amended Complaint on November 1, 1995; that the Defendants, EMERGENCY MEDICAL SERVICES AUTHORITY of the City of Tulsa and OSTEOPATHIC HOSPITAL FOUNDERS ASSOCIATION dba Tulsa Regional Medical Center formerly Oklahoma Osteopathic Hospital, filed their Answer on October 5, 1995; that the Defendant, SERVICE

COLLECTION ASSOCIATION, filed its Answer on November 6, 1995; and that the Defendants, CAROL A. HOUSE and DWIGHT RINGOLD dba Ringold Bail Bonds, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendant, CAROL A. HOUSE, is one and the same person as Carrol House, Carol Ann House, Carol House and formerly known as Carrol A. Garbey, Carol Ann Garbey and Carol Garbey, and will hereinafter be referred to as "CAROL A. HOUSE." The Defendant, CAROL A. HOUSE, has remained a single unmarried person since her divorce from Danny Garbey, in Case No. JFD-79-2334, in Tulsa County, Oklahoma.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Five (5), Block Four (4), MAPLEWOOD ADDITION to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on April 3, 1978, Danny R. Garbey and the Defendant, Carrol A. Garbey, executed and delivered to MAGER MORTGAGE COMPANY their mortgage note in the amount of $23,800.00, payable in monthly installments, with interest thereon at the rate of Eight and Three Fourths percent (8.75%) per annum.

The Court further finds that as security for the payment of the above-described note, Danny R. Garbey and the Defendant, Carrol A. Garbey, then Husband and Wife, executed and delivered to MAGER MORTGAGE COMPANY, a mortgage dated April 3,

1978, covering the above-described property. Said mortgage was recorded on April 5, 1978, in Book 4319, Page 1993, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 20, 1989, BRUMBAUGH AND FULTON COMPANY formerly Mager Mortgage Company, assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on March 23, 1989, in Book 5173, Page 1216, in the records of Tulsa County, Oklahoma.

The Court further finds that on January 7, 1985, the Defendant, CAROL ANN HOUSE, signed a Contract for Labor and Materials and Second Mortgage, to Rolox of Tulsa, Inc., this mortgage was recorded on January 21, 1985, in Book 4840, Page 1944, in the records of Tulsa County, Oklahoma.

The Court further finds that on January 7, 1985, ROLOX OF TULSA, assigned the above-described mortgage note and mortgage to Briercroft Service Corporation. This Assignment of Mortgage was recorded on January 25, 1985, in Book 4841, Page 1438, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 10, 1987, Briercroft Service Corporation, assigned the above-described mortgage note and mortgage to The United States of America, Department of HUD. This Assignment of Mortgage was recorded on March 16, 1987, in Book 5008, Page 99, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 28, 1989, the Defendant, CAROL A. HOUSE, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to

foreclose. Superseding agreements were reached between these same parties on October 6, 1989, October 2, 1990 and October 1991.

The Court further finds that the Defendant, CAROL A. HOUSE, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, CAROL A. HOUSE, is indebted to the Plaintiff in the principal sum of $36,630.79 representing $21,039.85 Unpaid Principal, $12,775.72 Accrued Interest, and $2,815.22 Penalties, plus interest at the rate of 8.75 percent per annum from April 15, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $22.00 which became a lien on the property as of June 26, 1992, a lien in the amount of $15.00 which became a lien on the property as of June 25, 1993, and a lien in the amount of $15.00 which became a lien on the property as of June 23, 1994. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, by virtue of its Answer filed on June 3, 1996 has a lien on the property which is the subject matter of this action by virtue of state income taxes in the amount of $721.77 which became a lien on the property as of June 19, 1984; a lien in the amount of $855.25 which became a lien on the property as of October 25, 1983; a lien in the amount of $3,687.73 which became a lien on the property as of May 4, 1994; and a lien in the amount of $219.75 which became a lien on the property as of June 30, 1995. The parties,

STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION and the Department of Housing and Urban Development, have agreed that the liens alleged by the OKLAHOMA TAX COMMISSION and Housing and Urban Development have the following priority and should be paid at disbursement in the following manner:

First:
In Payment of the judgment rendered herein favor of the Plaintiff;

Second:
In Payment of Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, in the amount of $855.25, plus accrued and accruing interest for state income taxes;

Third:
In Payment of Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, in the amount of $721.77, plus accrued and accruing interest for state income taxes;

Fourth:
In payment of Plaintiff, United States of America on behalf of the Secretary of Housing and Urban Development, in the amount of $4,300.00, plus interest at the rate of 16.5 percent per annum from February 1, 1985;

Fifth:
In payment of Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, in the amount of $3,687.73, plus accrued and accruing interest for state income taxes;

Sixth:
In payment of Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, in the amount of $219.75, plus accrued and accruing interest for state income taxes;

The Court further finds that the Defendant, EMERGENCY MEDICAL SERVICES AUTHORITY of the City of Tulsa, has a lien on the property which is the subject matter of this action by virtue of a judgment in the amount of $681.16 together with interest accruing at the rate of 10.030% and for the sum of $68.00 attorney fee, which became a lien on the property as of April 30, 1987, and Executed on March 30, 1992. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, OSTEOPATHIC HOSPITAL FOUNDERS ASSOCIATION dba Tulsa Regional Medical Center formerly Oklahoma Osteopathic Hospital, has a lien on the property which is the subject matter of this action by virtue of a judgement in the amount of $634.05 together with interest accruing at the rate of 10.030% per annum and for the sum of $63.00 attorney fee, which became a lien on the property as of April 30, 1987, and Executed on March 30, 1992. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, SERVICE COLLECTION ASSOCIATION, INC., a corporation, has a lien on the property which is the subject matter of this action by virtue of a judgment in the amount of $1,391.90 together with interest accruing at the rate of 15% per annum from the 18th day of September, 1985, and for the sum of $275,00 attorney fee, and accrued court costs in the amount of $111.00, which became a lien on the property as of September 18, 1985, and Executed on August 15, 1995. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, CAROL A. HOUSE and DWIGHT RINGOLD dba Ringold Bail Bonds, are in default, and have no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment against the Defendant, CAROL A. HOUSE, in the principal sum of $36,630.79, representing $21,039.85 Unpaid Principal, $12.775.72 Accrued Interest, and $2,815.22, plus interest at the rate of 8.75 percent per annum from April 15, 1995 until judgment, plus interest thereafter at the current legal rate of 5.81 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment against the Defendant, CAROL A. HOUSE, in the amount of $4,300.00, plus interest at the rate of 16.5 percent per annum from February 1, 1985, until judgment, plus interest thereafter at the legal rate until fully paid, for its second mortgage.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of $52.00, plus accrued and accruing interest, for personal property taxes for the years 1991, 1992, and 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, have and recover judgment In Rem in the amount of $5,484.50, plus accrued and accruing interest, for state income taxes, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, OSTEOPATHIC HOSPITAL FOUNDERS ASSOCIATION dba Tulsa Regional Medical Center formerly Oklahoma Osteopathic Hospital, have and recover judgment in the amount of $634.05 together with interest accruing at the rate of 10.030% per annum and for the sum of $63.00 attorney fee for judgment, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, EMERGENCY MEDICAL SERVICES AUTHORITY of the City of Tulsa, have and recover judgment in the amount of $681.16 together with interest accruing at the rate of 10.030% and for the sum of $68.00 attorney fee, for its judgment, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, SERVICE COLLECTION ASSOCIATION, INC., a corporation, have and recover judgment in the amount of $1,391.90 together with interest accruing at the rate of 15% per annum from the 18th day of September, 1985, and for the sum of $275,00 attorney fee, and accrued court costs in the amount of $111.00, for its judgment, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

CAROL A. HOUSE and DWIGHT RINGOLD dba Ringold Bail Bonds, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, CAROL A. HOUSE, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein favor of the Plaintiff;

Third:

In payment of Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, in the amount of $1,577.02, plus accrued and accruing interest, state income taxes.

Fourth:

In payment of Plaintiff, United States of America on behalf of the Secretary of Housing and Urban

Development, in the amount of $4,300.00, plus interest at the rate of 16.5 percent per annum from February 1, 1985;

Fifth:

In payment of Defendant, SERVICE COLLECTION ASSOCIATION, a corporation, in the amount of $1,391.90 together with interest accruing at the rate of 15% per annum from the 18th day of September, 1985, and for the sum of $275,00 attorney fee, and accrued court costs in the amount of $111.00, judgment.

Sixth:

In payment of Defendant, EMERGENCY MEDICAL SERVICES AUTHORITY of the City of Tulsa, in the amount of $681.16 together with interest accruing at the rate of 10.030% and for the sum of $68.00 attorney fee, judgment.

Seventh:

In payment of Defendant, OSTEOPATHIC HOSPITAL FOUNDERS ASSOCIATION dba Tulsa Regional Medical Center formerly Oklahoma Osteopathic Hospital, in the amount of $634.05 together with interest accruing at the rate of 10.030% per annum and for the sum of $63.00 attorney fee, judgment.

Eighth:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of $37.00, personal property taxes which are currently due and owing.

Ninth:

In payment of Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, in the amount of $3,687.73, state income taxes.

Tenth:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of $15.00, personal property taxes which are currently due and owing.

Eleventh:

In payment of Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA TAX COMMISSION, in the amount of $210.75, state income taxes.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right

to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

UNITED STATES DISTRICT JUDGE

APPROVED:

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Judgment of Foreclosure
Civil Action No. 95 C 842B

LFR:flv

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LA SOUND INTERNATIONAL, INC., a Nevada corporation,

Plaintiff,

vs.

RICHARD C. BERTSCH, an individual; and METROSOUND U.S.A., INC., a California corporation,

Defendants,

and

GENE LUM, an individual; NORA LUM, an individual; and MICHAEL BROWN, an individual, and JOHN DOE(S),

Third-Party Defendants.

Case No. 96-C-0118-B

ORDER GRANTING PRELIMINARY INJUNCTIVE RELIEF

On the 29th day of July, 1996, before this Court appeared Plaintiff LA Sound International, Inc. ("LA Sound"), and Defendant, Richard C. Bertsch ("Bertsch") on LA Sound's Motion for Preliminary Injunctive Relief pursuant to Fed.R.Civ.P. 65. In keeping with the Findings of Fact and Conclusions of Law entered this date, the Court concludes:

(a) LA Sound is likely to prevail on the merits of its infringement of trademark and unfair competition claims;

(b) LA Sound is likely to prevail on the merits of its breach of contract claim with

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LA SOUND INTERNATIONAL, INC., a Nevada corporation,

Plaintiff,

vs.

RICHARD C. BERTSCH, an individual; and METROSOUND U.S.A., INC., a California corporation,

Defendants,

and

GENE LUM, an individual; NORA LUM, an individual; and MICHAEL BROWN, an individual, and JOHN DOE(S),

Third-Party Defendants.

Case No. 96-C-0118-B

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

Plaintiff, LA Sound International, Inc. ("LA Sound") requested preliminary injunction pursuant to Fed.R.Civ.P. 65, in this alleged breach of contract and tortious interference action. The motion came on for hearing on July 29, 1996. The preliminary injunction seeks to prohibit the Defendant, Richard C. Bertsch ("Bertsch"), from (1) taking any further actions which infringe upon LA Sound's properly registered trademark of "LA SOUND",: (2) interfering further in LA Sound's conduct of its day-to-day business activities, and (3)

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soliciting LA Sound's employees and customers in violation of the express provisions of a valid and enforceable noncompetition agreement. The Defendants, Bertsch and Metrosound U.S.A., Inc. ("Metrosound"), deny the allegations and oppose the entry of the preliminary injunction.

Having heard testimony of the witnesses duly sworn, reviewed the pleadings and documentary evidence, and heard arguments of counsel, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Plaintiff, LA Sound, is a Nevada corporation with its principal place of business located in the State of California.

2. Defendant, Bertsch, is an individual and resident of the State of California. From April 7, 1995, until January 25, 1996, Bertsch was the president of LA Sound.

3. Defendant, Metrosound, is a California corporation with its principal place of business located in the State of California. Metrosound is owned and controlled by Defendant Bertsch.

4. On April 1, 1996, Defendant, Metrosound, sought relief under the bankruptcy laws of the United States by filing its petition under Chapter 11 of the United States Bankruptcy Code (11 U.S.C. §§ 101, *et. seq.*) in the Central District of California. Pursuant to 11 U.S.C. § 362, this action has been stayed as against Defendant Metrosound.

5. Nora Lum ("N. Lum") is and was at all relevant times a resident of Tulsa County, State of Oklahoma.

6. From January 1995 through April 7, 1996, Bertsch negotiated with N. Lum with respect to the creation and operation of LA Sound. LA Sound was in dire financial distress when Bertsch first approached N. Lum. On March 3, 1995, following negotiations, N. Lum and Bertsch entered into a written letter of intent previous to their final written "Definitive Agreement." On April 7, 1995, Bertsch and Lum, by their signatures, entered into a written agreement (the "Definitive Agreement") for the creation of LA Sound. (Plaintiff's Exhibit 3). Some of the personal negotiations actually took place in Tulsa, Oklahoma.

7. The Definitive Agreement provides, *inter alia*, for:

a. the transfer by Bertsch of the federally registered trademark "LA SOUND" to LA Sound;

b. the employment, at will, of Bertsch as the president of LA Sound and the payment of a salary of $60,000.00 per year for such employment;

c. a noncompetition agreement restricting, for one (1) year, Bertsch's and Metrosound's competitive activities and prohibiting Defendants' solicitation and employment of LA Sound's employees in the event Bertsch left the employ of LA Sound;

d. the transfer of ninety percent of the equity stock of Advanced Korean Electronics ("AKE") to Bertsch as trustee for LA Sound;

e. Bertsch would receive a twenty percent equity interest in LA Sound; eighty percent owned by N. Lum or the Lum family;

f. the loaning of $1,000,000.00 to LA Sound by N. Lum; and such additional sums as she may choose; and

g. Oklahoma law would apply in interpreting the Definitive Agreement. (Plaintiff's Exhibit B).

8. The parties expressly agreed in the Definitive Agreement that the written agreement:

> together with the agreements referenced [therein] constitutes the entire agreement and understanding between the parties and shall not be modified, altered, changed, or amended in any respect unless in writing and signed by all parties hereto. This Agreement supersedes and replaces the Letter Agreement, except that the parties agree to continue to be bound by Sections 5 and 10 of the Letter Agreement. (Plaintiff's Exhibit B).

9. On April 7, 1995, Bertsch assigned the federally registered Trademark "LA SOUND" to LA Sound. Bertsch conveyed the goodwill of LA Sound in the transaction.

10. During the negotiations of the Definitive Agreement, Bertsch represented that AKE, a Korean manufacturing company, was owned by his family but controlled by Bertsch. Bertsch further represented and undertook as part of the Definitive Agreement that he could and would obtain record title to 90% of the equity in AKE, to be held in trust for the benefit of LA Sound.

11. Bertsch has refused to perform his obligations under the Definitive Agreement by failing to cause the transfer of the AKE stock to Bertsch as trustee for LA Sound.

12. Starting in the last quarter of 1995, disputes arose between N. Lum and Bertsch with respect to various actions of Bertsch while the president of LA Sound. These actions included:

(a) the alleged misuse of LA Sound's checking accounts;

(b) the alleged misuse of LA Sound's funds;

(c) the alleged failure to pay commissions due to LA Sound's sales

representatives; and

(d) the failure of Bertsch to obtain ownership of 90% of the stock of AKE.

13. On January 25, 1996, by action of the Board of Directors of LA Sound, Bertsch was removed as the president of LA Sound and was so notified. On that same date, pursuant to the Agreement, Bertsch was notified that his employment with LA Sound was terminated effective in sixty (60) days.

14. At the same time that Bertsch was served with notice of his termination, Bertsch was requested by LA Sound to vacate the premises and to relinquish his duties as President.

15. These demands notwithstanding, Bertsch refused to vacate the premises of LA Sound and continued, until temporarily restrained by this Court, to wrongfully direct and instruct employees of LA Sound, all without the consent of LA Sound.

16. Despite his removal as president of LA Sound and the contractual prohibitions on assigment of the "LA SOUND" trademark, Bertsch, on January 25, 1996, without authority or authorization from LA Sound, executed a document as the president of LA Sound purporting to cause LA Sound to assign the registered trademark "LA SOUND" to Bertsch individually. (Plaintiff's Exhibit H).

17. Thereafter, Bertsch used the "LA SOUND" trademark in conducting a competing electronics-related business.

18. These activities included: (a) contacting customers of LA Sound and advising

them that Bertsch, and not LA Sound, was the true owner of the trademark "LA SOUND," and (b) directly or indirectly selling electronics equipment branded with the LA Sound name.

19. After being notified of his termination as president of LA Sound and without authorization from LA Sound, Bertsch caused certain personal property, including several automobiles used by LA Sound in the marketing of its electronics products, a van reflecting the LA Sound logo, a trailer for transporting the above-mentioned show cars, and certain warehouse and office equipment and fixtures, to be transferred to the books of Metrosound. Bertsch then took possession of this personal property and has refused to return it to LA Sound. (Plaintiff's Exhibit I).

20. While Bertsch was the president of LA Sound, the company was actively pursuing the development, production and marketing of three CD ROM products, an internal CD ROM changer, an external CD ROM changer, and a 5-CD AM-FM in-dash changer (the "CD ROM Products"). These CD ROM Products were being developed in conjunction with CarMate Mfg. Co. ("CarMate"). (Plaintiff's Exhibits O-S).

21. Since his termination as president of LA Sound, Bertsch has contacted CarMate in order to convert the corporate opportunity of LA Sound to develop and market the CD ROM Products, to his own use.

22. Further, despite his removal as president and his termination as an employee of LA Sound, Bertsch, individually and through Metrosound, until temporarily restrained by this Court, continued to interfere with the business operations of LA Sound. This interference includes, but is not limited to, the following:

a. denying access to the physical premise and property of LA Sound to the authorized representatives of LA Sound;

b. denying access to the books and records of LA Sound to its directors and other authorized agents;

c. diverting the funds and other assets of LA Sound to noncorporate uses;

d. transferring various assets and inventory of LA Sound to Metrosound;

e. holding himself out to LA Sound's employees, creditors, vendors and suppliers as the duly authorized president of LA Sound; and

f. usurping the corporate opportunities of LA Sound for himself and Metrosound.

23. LA Sound has been, and now is, extensively engaged in the business of developing, marketing and distributing consumer electronics throughout the United States using the registered trademark "LA SOUND." LA Sound is the exclusive owner of said trademark. Further, said trademark has become, through widespread and favorable public acceptance and recognition, an asset of substantial value to LA Sound.

24. Bertsch and Metrosound continued to use the "LA SOUND" name in conjunction with the electronics business notwithstanding a complete lack of authorization to do so.

25. The unauthorized use of the name "LA SOUND" causes likelihood of confusion, deception and mistake with regard to its true owner.

26. During the period that Bertsch and Metrosound persist, unlawfully and in violation of LA Sound's rights to use the "LA SOUND" trademark and to hold themselves

out as LA Sound, the business of LA Sound experiences substantial injury to the business prospects, reputation and goodwill of LA Sound.

27. The aforementioned acts of infringement have actually damaged LA Sound and will continue to cause further actual and irreparable injury to LA Sound if Bertsch and Metrosound are not restrained by this Court from further violation of LA Sound's rights.

28. Bertsch and Metrosound each agreed that they would not, directly or indirectly, compete with LA Sound for a term of one (1) year from the date of Bertsch's termination. (Plaintiff's Exhibit B-Exhibit D thereto). The above-mentioned actions of Bertsch and Metrosound violate said agreement.

29. Unless enjoined by order of this Court, these wrongful acts of Bertsch will continue and LA Sound will suffer irreparable harm.

30. LA Sound has demonstrated that it enjoys a likelihood of success on the merits of its claims for trademark infringement, unfair competition, tortious interference with business relations and breach of noncompetition agreements.

31. A balancing of harms favors the granting of preliminary injunctive relief during the pendency of this action.

32. The issuance of preliminary injunctive relief serves the public policy of the State of Oklahoma by enforcing valid contract and trademark rights.

33. Absent the entry of preliminary injunctive relief, LA Sound will suffer irreparable injury.

34. LA Sound is entitled to the requested preliminary injunction.

35. Security in the sum of Fifty Thousand Dollars ($50,000.00), posted by LA Sound will sufficiently protect Defendants in the event that it is later found that preliminary injunctive relief was improvidently granted.

CONCLUSIONS OF LAW

1. Jurisdiction is properly asserted over the subject matter of this action pursuant to 28 U.S.C. §§ 1331, 1338, 1367 and 15 U.S.C. § 1121.

2. Personal jurisdiction over each Defendant is properly exercised by this Court in that both Defendants have significant contacts with the State of Oklahoma and this district arising out of the transactions complained of herein.

3. Venue is properly laid in this district pursuant to 28 U.S.C. § 1391, and the agreement of the parties.

4. Any Finding of Fact above that might be properly characterized a Conclusion of Law is incorporated herein.

5. Four (4) factors must be considered as a prerequisite to the award of preliminary injunctive relief:

a. Whether there is a likelihood that the applicant will prevail on the merits of the claim;

b. Whether there is a substantial threat that the applicant will suffer irreparable injury if the injunction is not granted;

c. Whether the threatened injury to the applicant outweighs any threatened harm the injunction may have on other parties;

d. Whether the public interest will be harmed by issuance of the injunction.

Associated Securities Corp. v. SEC, 283 F.2d 773, 774-75 (10th Cir. 1960); Smith v. Soil Conservation Service, 563 F.Supp. 843 (W.D. Okla. 1982), aff'd, 1983 WL 160548, 20ERC 1146, 13 Envtl.L.Rep. 20,886 (10th Cir. 1983).

6. The foregoing test is satisfied and injunctive relief is appropriate where there is a likelihood of recurrent violations of plaintiff's rights which result in a continuing injury. SCFC ILC, Inc. v. VISA USA, Inc., 936 F.2d 1096 (10th Cir. 1991); Morrill v. Becton, Dickinson and Co., 564 F.Supp. 1099, 1111 (E.D. Mo. 1983), *aff'd* and remanded in part 747 F.2d 1217 (8th Cir. 1984).

7. With regard to the enforcement of trademarks, a moving party, to establish the prerequisites for injunctive relief, need only show:

a. A combination of probable success on the merits and possibility of irreparable injury; or

b. That serious questions are raised and the balance of hardships tips sharply in its favor.

15 U.S.C. § 1116; U-Haul International, Inc. v. Jartran, Inc., 522 F.Supp. 1238 (D. Ariz. 1981), *aff'd*, 681 F.2d 1159 (9th Cir. 1982); *see also*, Communications Satellite Corp. v. Comcet, Inc., 429 F.2d 1245 (4th Cir. 1990), *cert. denied*, 400 U.S. 942, 91 S.Ct. 240, 27 L.Ed.2d 245 (1970); Interbank Card Assoc. v. Simms, 431 F.Supp. 131 (M.D.N.C. 1977). Under either of these standards, LA Sound is entitled to preliminary injunctive relief.

8. 15 U.S.C. § 1114 provides:

> Any person who shall, without the consent of the registrant . . . use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered

> mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive . . . shall be liable in a civil action by the registrant.

Defendants have violated this statute by their actions here.

9. Plaintiff's ownership of the mark gives LA Sound the exclusive right to use the mark in commerce in connection with the goods or services specified in the certificate. 15 U.S.C. § 1057.

10. Plaintiff's Exhibit B, paragraph 14, provides:

> This agreement shall be governed by the laws of the state of Oklahoma, both as to interpretation and performance, without regard to choice of law principles.

11. As heretofore stated, Bertsch has violated both the noncompetition agreement and material contractual provisions.

12. Oklahoma has statutorily codified its position with respect to noncompetition agreements in general. *See*, Okla. Stat. tit. 15, §§ 217-19 (1993). Judicial interpretation of these statutes has consistently verified that only "unreasonable restraints" on competition are invalid. *See*, Crown Paint Co. v. Bankston, 640 P.2d 948, 952 (Okla. 1981), *cert. denied*, 455 U.S. 946, 102 S.Ct. 1444, 71 L.Ed.2d 659 (1982), stating:

> Statutes invalidating contracts in restraint of trade must be determined by its [sic] reasonableness in view of the particular circumstance. An agreement in illegal restraint of trade is void, but an agreement in reasonable restraint of trade is valid. [Footnotes omitted.] Thus, we see that not all restraints of trade are outlawed by 15 O.S. 1971 § 217. Only those restraints which are unreasonable are outlawed.

Board of Regents of the University of Oklahoma v. National Collegiate Athletic Assoc., 561 P.2d 499, 508 n. 27 (Okla. 1977) ("[Section 217] precludes only those contracts which restrain the employee from in any manner or extent whatsoever exercising a lawful profession, trade or business of any kind whatsoever."). Thus, if a contract seeks only to restrict competitive activities in a reasonable fashion, it remains valid and enforceable.

13. Bertsch's claim that he was fraudulently induced into the Definitive Agreement is not likely to succeed at a trial on the merits. *See,* Okla. Stat. tit. 15, § 136 (1996).

14. Bertsch's claim that he is entitled, pursuant to Paragraph 7 of the Definitive Agreement, to partial rescission of that agreement must fail under Oklahoma law. *See* Okla. Stat. tit. 15, § 235 (1993); Ware v. City of Tulsa, 312 P.2d 946 (Okla. 1957).

15. The language of the Definitive Agreement providing that, if the requirements of Paragraph 7 are not met before November 1, 1995, the agreement will be null and void, created an option in favor of Lum to terminate the Definitive Agreement at that time. *See,* A. Corbin, Corbin on Contracts, § 761 at 517 (1951).

16. Here, Plaintiff does not seek to rescind the Definitive Agreement. To the contrary, Plaintiff seeks to enforce the provisions of the Definitive Agreement and seeks damages for Bertsch's failure to perform thereunder.

17. Bertsch cannot, by his own inaction in failing to obtain the ownership of the AKE stock, cause the failure of an essential purpose of that agreement so as to obtain its rescission. *See* Anderson v. Pickering, 541 P.2d 1361 (Okla. Ct. App. 1975); King v. W.R. Oakley, 434 P.2d 868, 874 (Okla. 1967).

18. The acts of Bertsch in the unauthorized use of LA Sound's registered trademark, the substantial interference with LA Sound's business relations, and the breach of the Noncompetition Agreement have and continue to cause LA Sound substantial and irreparable harm.

19. Both Oklahoma and California public policy strongly favor a party's right to establish and conduct a lawful business free of unlawful interference. *See* Ellison v. An-Son Corp., 751 P.2d 1102 (Okla. Ct. App. 1987); Tatum v. Philip Morris, 16 F.3d 417, 1993 W.L. 520983, 4 (10th Cir. 1993) (unpublished opinion applying Oklahoma law); Institute of Veterinary Pathology, 172 Cal. Rptr. at 82.

20. The infringement of LA Sound's trademark, the interference with its business relations, and the breach of the Noncompetition Agreement outweigh Bertsch's interest in pursuing their unlawful course of misappropriating the "LA SOUND" name, LA Sound's facilities, and LA Sound's assets during the pendency of this action. For instance, any funds gained by Bertsch through the use of the "LA SOUND" name and the use of LA Sound's facilities in conjunction with a consumer electronics business are funds wrongfully obtained by Bertsch and rightfully belonging to LA Sound. Therefore, preventing Defendants from garnering profits by their misdeeds is neither inequitable nor injurious to them. *See* Polyglycoat Corp. v. Environmental Chemicals, Inc., 509 F.Supp. 36, 39 (S.D.N.Y. 1980).

21. LA Sound has sufficiently demonstrated that each of the legal requisites to the issuance of preliminary injunctive relief are present. Thus, preliminary injunctive relief requiring Bertsch to refrain some taking any further actions which infringe upon LA Sound's

properly registered trademark of "LA SOUND," from interfering further in LA Sound's conduct of its day-to-day business activities, from competing further with LA Sound and from soliciting LA Sound's employees and customers in violation of the express provisions of the Noncompetition Agreement is appropriate.

22. Plaintiff's request for preliminary injunctive relief should be, and hereby is granted pursuant to Fed.R.Civ.P. 65, as is reflected in the Order Granting Temporary Injunctive Relief filed contemporaneously herewith.

IT IS HEREBY SO ORDERED this 8th day of August, 1996.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

LOYLE GORDON, JR., and KAREN J. GORDON, husband and wife,	)	
Plaintiffs,	)	
vs.	)	Case No. 95-C-799K
COBB-VANTRESS, INC., a Delaware corporation, and LARRY ROBERTS, Individually,	)	
Defendants.	)	

ORDER OF DISMISSAL WITH PREJUDICE

The parties hereto, having announced settlement of their dispute and having moved the Court to enter an Order of Dismissal With Prejudice with each party to bear its own costs, the Court does hereby dismiss the above proceedings with prejudice, each party to bear its own costs.

DATED this 7 day of August, 1996.

Judge of the United States District Court

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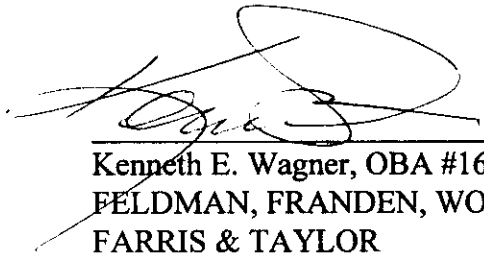
APPROVED:



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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TINA WILSON,

Plaintiff,

vs.

CITY OF COMMERCE,

Defendant.

No. 96-C-12-K

ADMINISTRATIVE CLOSING ORDER

The Court has been advised that this action has settled or is in the process of being settled. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within sixty (60) days that settlement has not been completed and further litigation is necessary.

ORDERED this 7 day of August, 1996.

Terry C. Kern

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

5

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GLEN EDWARD MORANG,)
)
Plaintiff,)
)
vs.) No. 95-C-142-K
)
STANLEY GLANZ, et al.,)
)
Defendant.)

O R D E R

This matter comes before the Court on Defendant Glanz' motion to reconsider the Order entered by this Court on February 6, 1996. In that Order, the Court addressed the motions to dismiss or, in the alternative, for summary judgment of the defendants, Glanz and Moss. Plaintiff has objected to defendant's motion to reconsider. The Court incorporates that portion of the February 6, 1996 Order setting forth the facts underlying this case.

The Court concluded on February 6, 1996 that, as a matter of law, the motion to dismiss of Defendant Moss should be granted. However, the motion to dismiss of Defendant Glanz was denied as to plaintiff's claim of wrongful imprisonment for nonpayment of fine, but granted in all other respects.

Defendant Glanz now asks the Court to reconsider that Order. Whether to grant or deny a motion for reconsideration is committed to the Court's discretion. Hancock v. Oklahoma City, 857 F.2d 1394, 1395 (10th Cir. 1988). Generally, courts recognize three major grounds for reconsideration: 1) an intervening change in

controlling law; 2) availability of new evidence; or 3) the need to correct clear error or prevent manifest injustice. Hamner v. BMY Combat Systems, 874 F.Supp. 322 (D.Ks. 1995).

In this instance, defendant believes the Court made an error by misapplying legal precedent that is binding on this Court. Defendant argues that the Court should not have held him liable under § 1983 for a constitutional violation of plaintiff's rights based upon court-ordered imprisonment of plaintiff for nonpayment of a fine. Citing Seventh, Ninth and Tenth Circuit case law, defendant contends that he was carrying out an order of a state court judge, and therefore, he enjoys the same judicial immunity that the judge who issued the order enjoys.

An official charged with the duty of executing a facially valid court order enjoys absolute immunity from liability for damages in a suit challenging conduct prescribed by that order. Valdez v. City and County of Denver, 878 F.2d 1285, 1287 (10th Cir. 1989). Both plaintiff and defendant admit Defendant Glanz was following a court-directed order by detaining plaintiff in the county jail. And although the incarceration of plaintiff for failure to pay fine and costs may have been improper,[1] Defendant Glanz as the sheriff had no choice under applicable Oklahoma law[2]

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[1] In Tate v. Short, 401 U.S. 395, 399 (1971), the Supreme Court held that imprisoning an indigent solely because he is unable to pay his fines contravenes the equal protection clause by discriminating based upon economic status.

[2] See 19 O.S. § 514; 57 O.S. § 15

but to carry out the order of the judge. To force officials performing ministerial acts intimately related to the judicial process to answer in court every time a litigant believes the judge acted improperly is unacceptable. Id., 878 F.2d at 1288. Furthermore, it is not required of officials such as defendant to act as "pseudo-appellate courts scrutinizing the orders of judges." Id. Because the record viewed as a whole indicates that every action of the Defendant Glanz to which plaintiff objects was taken under the direction of a state court judge, the Order of February 6, 1996 is amended to reflect dismissal of plaintiff's wrongful imprisonment claim against Defendant Glanz on the basis of absolute immunity.

ACCORDINGLY, IT IS HEREBY ORDERED that:

a) Defendant Glanz' motion for reconsideration (Docket #28) is GRANTED as to the absolute immunity defense;

b) the February 6, 1996 Order denying Glanz' motion to dismiss as to plaintiff's wrongful imprisonment for nonpayment of fine is VACATED and Defendant Glanz' motion to dismiss is GRANTED in all respects.

SO ORDERED THIS 7 DAY OF AUGUST, 1996.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JAMES W. STOVALL,

Plaintiff,

vs.

MARVIN T. RUNYON,

Defendant.

No. 95-C-591-K

ADMINISTRATIVE CLOSING ORDER

The Court has been advised that this action has settled or is in the process of being settled. Therefore it is not necessary that the action remain upon the calendar of the Court.

IT IS THEREFORE ORDERED that the Clerk administratively terminate this action in his records, without prejudice to the rights of the parties to reopen the proceedings for good cause shown for the entry of any stipulation, order, judgment, or for any other purpose required to obtain a final determination of the litigation. The Court retains complete jurisdiction to vacate this order and to reopen the action upon cause shown within ninety (90) days that settlement has not been completed and further litigation is necessary.

ORDERED this 7 day of August, 1996.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

13

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THE HOME-STAKE OIL & GAS COMPANY and THE HOME-STAKE ROYALTY CORPORATION,	)	
Plaintiffs,	)	
vs.	)	Case No. 94-C-1187H
FEDERAL INSURANCE COMPANY,	)	
Defendant.	)	

STIPULATION OF DISMISSAL

COMES NOW the Plaintiffs hereto and stipulate that the above captioned matter may be, and is hereby, dismissed with prejudice to Plaintiffs' right to refile same. The counter-claim filed by the Defendant is also dismissed with prejudice to Defendant's right to refile same. The parties to bear their own costs and attorneys' fees.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
RONALD RAY YOUNGER,)
)
Defendants.)

Case No. 90-CR-38-E
96-C-246-E

ORDER

Now before the Court is the 28 U.S.C. §2255 Motion to Vacate, Set Aside, or Correct Sentence of the Defendant Ronald Ray Younger (Younger) (Docket # 46).

On May 22, 1990, Younger pled guilty to a charge of knowingly carrying a firearm during and in relation to a drug trafficking crime in violation of 18 U.S.C. §924(c)(1). He was sentenced to five years imprisonment and three years supervised release. He now brings this motion to vacate, arguing that under Bailey v. United States, 116 S.Ct. 501 (1995), his conviction should be overturned. The government correctly points out that Bailey does not deal with the "carry" prong of §924(c) to which Younger pled guilty, but rather with the "use" prong of §924(c) with which Younger was not charged. This, however, is not the fatal flaw in Younger's motion.

The decision of United States v. Broce, 109 S.Ct. 757 (1989) is dispositive of this matter. By pleading guilty, Younger has "admitt[ed] guilt of a substantive crime." Id., at p. 762. In short the general rule that "a voluntary and intelligent plea of guilty made by an accused person, who has been advised by competent counsel may not be collaterally attacked," Id., at p. 765, applies in this case.

Younger's Motion to Vacate, Set Aside, or Correct Sentence (Docket # 46) is denied.

SO ORDERED THIS 5 DAY OF ~~JULY~~ AUGUST, 1996

JAMES O. ELLISON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF OKLAHOMA

ANNETTE A. BLANKE, individually, and ANNETTE A. BLANKE, as mother and guardian of JESSE BLANKE and KRISTA BLANKE, minors,

Plaintiffs,

vs.

BILLY E. ALEXANDER, individually, BUILDERS TRANSPORT, INC., a foreign corporation, and PLANET INSURANCE COMPANY a/k/a RELIANCE NATIONAL INDEMNITY COMPANY, a foreign corporation,

Defendants.

Case No. 94-C-1165-BU

ORDER

This matter comes before the Court upon Defendants' Motion for New Trial and Alternative Motion for Remittitur. Plaintiffs have responded to the motion and Defendants have replied thereto. Plaintiffs have also filed a supplemental brief and Defendants have responded thereto. Upon careful review of all the parties' submissions and the applicable law, the Court makes its determination.

In their motion, Defendants seek a new trial, pursuant to Rule 59, Fed. R. Civ. P., for the following reasons:

(1) the Court erred in interpreting Okla. Stat. tit. 47, § 169, in a manner which provided Plaintiffs with the absolute right to inform the jury that Defendant, Builders Transport, Inc., had liability insurance coverage and that Planet Insurance Company a/k/a Reliance National Indemnity Company was a named Defendant, in

light of Defendants' stipulations that a policy of insurance existed and that Defendant, Planet Insurance Company, a/k/a Reliance National Indemnity Company agreed to be bound by the judgment;

(2) the Court erred in abdicating its responsibility of weighing the probative value of evidence of insurance against the danger of unfair prejudice as required by Rule 403, Fed. R. Evid.;

(3) the jury's verdict in finding that Plaintiff, Annette A. Blanke, sustained damages in the amount of $500,000.00 is not supported by the evidence;

(4) the jury's verdict awarding Plaintiff, Annette A. Blanke, on behalf of her minor daughter, Krista Blanke, the amount of $17,000.00 is not supported by the evidence;

(5) the Court erred in refusing to instruct the jury on the distinction under Oklahoma law between cause and a mere condition;

(6) the Court erred in instructing the jury that damages for permanent injuries could be awarded to Plaintiff, Annette A. Blanke, when there was no competent evidence, including expert medical testimony, that Plaintiff suffered permanent injuries as a result of the accident; and

(7) the Court erred in refusing to grant Defendants' motion for a directed verdict on the issue of Plaintiff, Annette A. Blanke's medical expenses.

In the alternative, Defendants seek an order directing a remittitur and reducing the amount of damages to Plaintiff, Annette A. Blanke, and Plaintiff, Annette A. Blanke, on behalf of her minor

daughter, Krista Blanke, in an amount not exceeding their medical expenses.

Generally, motions for new trial under Rule 59 are committed to the sound discretion of the district court. McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 556 (1984). In reviewing a motion for new trial, the court should "exercise judgment in preference to the automatic reversal for 'error' and ignore errors that do not affect the essential fairness of the trial." Id. at 553. "[T]he party seeking to set aside a jury verdict must demonstrate trial errors which constitute prejudicial error or that the verdict is not based on substantial evidence." White v. Conoco, Inc., 710 F.2d 1442, 1443 (10th Cir. 1983). Okla. Stat. tit. 47, § 169

Prior to trial, the Court entered an Order denying Defendants' motion in limine on the issue of the admissibility of evidence of liability insurance and the issue of disclosing the identity of Planet Insurance Company a/k/a Reliance National Indemnity Company as Defendant in this case. Prior to the selection of the petit jury, the Court identified Planet Insurance Company a/k/a Reliance National Indemnity Company as a Defendant. The Court also listed Planet Insurance Company a/k/a Reliance National Indemnity Company as a Defendant in the case caption of the Jury Instructions and on the verdict forms. Defendants contend that the Court committed prejudicial error in identifying Planet Insurance Company a/k/a Reliance National Indemnity Company as a Defendant. Defendants specifically contend that the cases cited by the Court in its Order

denying the motion in limine are inapposite. Defendants assert that the cases cited by the Court concerned the question of misjoinder or bifurcation and not the admissibility of evidence concerning insurance and the presence of an insurance company as a defendant. They assert that the Oklahoma Supreme Court's opinion in Tidmore v. Fullman, 646 P.2d 1278 (Okla. 1982), is controlling regarding the admissibility of insurance in cases where a direct cause of action exists against an insurer. Although Tidmore did not involve an action under section 169, Defendants contend that the Oklahoma Supreme Court's decision in Daigle v. Hamilton, 782 P.2d 1379 (Okla. 1989), supports their position that Tidmore equally applies to section 169 cases. Based upon Tidmore and Daigle, Defendants argue that evidence of the existence of liability insurance and the fact that Planet Insurance Company a/k/a Reliance National Indemnity Company was a Defendant should have been excluded from evidence at trial. Furthermore, Defendants argue that notwithstanding Tidmore and Daigle, such evidence should have been excluded under Fed. R. Evid. 403.

The Court has reviewed the case law cited by the parties. Having done so, the Court is not persuaded that this case is governed by Tidmore. In the Court's view, Tidmore is distinguishable as it did not involve a case under section 169. The Court also does not agree that Daigle supports Defendants' contention that Tidmore applies. Instead, the Court concludes that the Oklahoma Supreme Court's decision in Oklahoma Transportation Company v. Claiborn, 434 P.2d 299 (Okla. 1967), applies to the

instant case. In Claiborn, the Oklahoma Supreme Court specifically addressed the reference to insurance in a case under section 169. In discussing the reference to insurance at trial, the Court stated:

> The Legislature, by authorizing the joinder as party defendants a motor carrier and its insurance carrier, in effect determined that when the liability insurance policy or bond is filed and the certificate of convenience or necessity is issued, no prejudice results from such joinder. Stated in another way, the Legislature, by authorizing the joinder of the insurance carrier, has in effect determined that knowledge of insurance liability is not prejudicial to the right of the motor carrier or to its insurance carrier.
>
> Had defendant's insurance carrier been joined as a party defendant, which it could have been, the jury would have knowledge that insurance was involved. Therefore, we are of the opinion that if defendant's insurance carrier had been joined as a party defendant in the instant action, the reference to the insurance would not have been prejudicial to the rights of the defendant. Our determination that the same would not have been prejudicial in the present case if defendant's insurance carrier had been joined as a party defendant does not necessarily mean that such joinder removes all objections and impediments against the injection of insurance in such cases during all phases of the proceedings. Whether the injection of insurance under such circumstances would be prejudicial would be dependent upon the facts and circumstances in each particular case.
>
> Since the Legislature has in effect determined that joinder of an insurance carrier as a party defendant, which imputes knowledge that a motor carrier has liability insurance, is not prejudicial to the rights of the motor carrier and the insurance carrier when they are both joined as party defendants, we can see no reason why the mere knowledge that a motor carrier does have liability insurance in an action brought only against the motor carrier, in and of itself, constitutes reversible error.

434 P.2d at 302.[1]

In the instant case, Plaintiffs properly joined Planet Insurance Company a/k/a Reliance National Indemnity Company as a Defendant pursuant to section 169. Under Claiborn, the Court concludes that the mere identification of Planet Insurance Company a/k/a Reliance National Indemnity Company as a Defendant in the case, in and of itself, does not constitute reversible error. Despite Defendants' arguments to the contrary, the identification of Planet Insurance Company was not prejudicial under the facts and circumstances of this case. In the Court's view, Defendant did receive a fair trial of the issues. The Court notes that the jurors were never advised of the insurance policy limits. Moreover, the Court notes that Defendants also injected the reference to insurance in this case by informing the jurors that Planet Insurance Company a/k/a Reliance National Indemnity Company was the liability insurance carrier for Defendant, Builders Transport, Inc.

The Court further concludes that it did not abuse its discretion in failing to decline identifying Planet Insurance

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[1]Significantly, the Court notes that the Oklahoma Supreme Court in Tidmore does not mention the Claiborn case. Thus, there is no indication by the Oklahoma Supreme Court of overturning the previous ruling regarding reference to liability insurance in section 169 cases.

The Court further notes that the Claiborn case is in accordance with the early section 169 cases, specifically, Be-Mac Transport Co. v. Lairmore, 129 P.2d 192, 196 (Okla. 1942) (joinder of the motor carrier and its insurer being proper in this case, the general rule against references to liability insurance does not apply); G.A. Nichols Co. v. Lockhart, 129 P.2d 599, 604 (Okla. 1942) (court aware of no rule that would prevent one of two or more parties, who if liable at all, are jointly and severally liable to another to hide his identity at trial merely by confessing liability in advance of any judgment).

Company a/k/a Reliance National Indemnity Company as a Defendant pursuant to Rule 403. As stated in Claiborn, the Oklahoma Legislature, by authorizing joinder of the insurance carrier under section 169, has determined that knowledge the motor carrier has liability insurance is not prejudicial. Id. Because Planet Insurance Company a/k/a Reliance National Indemnity Company was a proper party to this action, the Court concludes that the mere identification of Planet Insurance Company a/k/a Reliance National Indemnity Company as a Defendant was not prejudicial error.

The Court notes that Defendants argue in their amended reply brief that even if the identification of Planet Insurance Company a/k/a Reliance National Indemnity Company were permitted in cases involving motor carriers and liability insurance carriers under section 169, it should not apply in a case under section 169 which also involves an individual truck driver. The Court, however, declines to address this argument. This argument was not raised by Defendants in their motion in limine or during trial. Moreover, it was not raised by Defendants until their amended reply brief.

Damages

Defendants also urge that a new trial is warranted because the damage awards to Plaintiff, Annette A. Blanke, and Plaintiff, Annette A. Blanke, on behalf of her minor daughter, Krista Blanke, are excessive and against the weight of the evidence. They argue that the size of the jury awards reflects that the jury awards were the result of "passion and prejudice" attributable to the Court identifying Planet Insurance Company a/k/a Reliance National

Indemnity Company as a Defendant.

When evaluating a motion for new trial based upon an excessive verdict claim, the Court must determine whether the jury award "shock[s] the judicial conscience and . . . raise[s] an irresistible inference that passion, prejudice, corruption or other improper cause invaded the trial. . . ." Barnes v. Smith, 305 F.2d 226, 228 (10th Cir. 1962). "Absent such a showing of passion or prejudice, the jury's finding on damages is considered inviolate." Black v. Hieb's Enter., Inc., 805 F.2d 360, 362 (10th Cir. 1986).

With these principles in mind, the Court is not shocked by the size of the damage awards to Plaintiff, Annette A. Blanke, and Plaintiff, Annette A. Blanke, on behalf of her minor daughter, Krista Blanke. The Court cannot conclude that the jury acted out of passion or prejudice. Although the jury awards are significant and may not be the jury awards which the Court would have given, the Court finds that the jury awards are not so excessive that they "shock judicial conscience" or "raise an irresistible inference of passion, prejudice, corruption or other improper cause." The Court disagrees with Defendants' contention that the Court's identification of Planet Insurance Company a/k/a Reliance National Indemnity Company as a Defendant in this case in any way caused the jury to act prejudicially or with passion. The Court properly instructed the jury regarding the damages they could return. The Court cannot impute to the jury an inability to understand the jury instructions. The elements of damages the jury could consider for Plaintiff, Annette A. Blanke, included physical pain and suffering,

past and future; mental pain and suffering, past and future; her age; her physical condition immediately before and after the accident; the nature and extent of her injuries, whether the injuries are permanent; the physical impairment; the disfigurement; the reasonable medical expenses of the necessary medical care, treatment, and services, past and future; and the reasonable expenses of the necessary medical care, treatment and services she has incurred on behalf of her daughter, Krista. The elements of damages the jury could consider for Plaintiff, Annette A. Blanke, on behalf of her minor daughter, Krista Blanke, included Krista's past physical pain and suffering; her past mental pain and suffering; her age; her physical condition immediately before and after the accident; and the nature and extent of her injuries. The jury heard testimony regarding all of these elements of damages. The jury had the opportunity to observe Plaintiff, Annette A. Blanke, and her daughter, Krista, and hear their testimony first hand. It was the jury's function, as trier of fact, to determine the amount of damages that would fairly compensate them and the jury had wide discretion in making that determination. Bennett v. Longacre, 774 F.2d 1024, 1028 (10th Cir. 1985). The Court cannot say that it was irrational for the jury to award $500,000 in damages to Plaintiff, Annette A. Blanke, and $17,000 in damages to Plaintiff's daughter, Krista.

Defendants alternatively claim that the Court should grant a remittitur for the excessive award of damages to Plaintiff, Annette A. Blanke, and Plaintiff, Annette A. Blanke, on behalf of her minor

daughter, Krista Blanke. Like a motion for new trial based upon an excessive jury award, the Court, in evaluating a motion for remittitur, must determine whether the verdict is so excessive that it shocks the judicial conscience or leads to an inescapable inference that it resulted from improper passion or prejudice on the part of the jury. Malandris v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 703 F.2d 1152, 1177 (10th Cir. 1981), cert. denied, 464 U.S. 824 (1983).

The Court has fully considered Defendants' contentions and examined the issues presented. Because the determination of damages is traditionally a jury function, Whiteley v. OKC Corp., 719 F.2d 1051, 1058 (10th Cir. 1983), and the Court concludes that the jury's award of $500,000 to Plaintiff, Annette A. Blanke, and $17,000 to Plaintiff, Annette A. Blanke, on behalf of her minor daughter, Krista Blanke, does not shock judicial conscience, the Court finds that a remittitur is not appropriate.

As stated, Defendants also allege that the jury verdict is against the weight of the evidence. A motion for new trial on the grounds that the jury verdict is against the weight of the evidence involves a review of the facts presented at trial. Black, 805 F.2d at 363. When evaluating a motion for new trial, the Court must "focus[] on whether the verdict is clearly, decidedly and overwhelmingly against the weight of the evidence." Id. The amount of damages awarded to the jury can be supported by any competent evidence tending to sustain it. Id.

The Court concludes that the jury's damage awards in the

instant case are not clearly, decidedly and overwhelming against the weight of the evidence. A new trial is not warranted simply because the Court would have reached a different verdict. Richardson v. Suzuki Motor Co., Ltd., 868 F.2d 1226, 1248 (Fed.Cir. 1989). In the Court's view, there was sufficient evidence in the record to support the jury's damage awards. Therefore, the Court finds that Defendants are not entitled to a new trial.

Condition Versus Cause

Defendants additionally contend that the Court erred in failing to instruct the jury as to the distinction under Oklahoma law between condition versus. At trial, Defendants specifically requested the Court to submit to the jury their Proposed Jury Instruction entitled "DISTINCTION BETWEEN DIRECT CAUSE OF INJURY AND CONDITION OR OCCASION OF INJURY." Defendants relied principally upon Thur v. Dunkley, 474 P.2d 403 (Okla. 1970), to support their jury instruction. The Court declined to submit the instruction to the jury on the basis that the facts in Thur were distinguishable from the instant case.

In their motion, Defendants contend that the condition versus cause distinction is not limited to the facts under Thur and similar situations. Defendants contend that the distinction is a fundamental premise of the element of proximate cause under Oklahoma law and the jury should have been instructed as to the distinction.

Upon review, the Court concludes that it did not commit reversible error in declining to submit Defendants' proposed jury

instruction to the jury. The Court gave the "Direct Cause - Defined" Instruction found in the Oklahoma Uniform Jury Instructions - Civil (Second Edition). That instruction stated in pertinent part that "[f]or negligence to be a direct cause it is necessary that some injury to persons in the plaintiffs' situation must have been a reasonably foreseeable result of the negligence." The Oklahoma Supreme Court has stated that the distinction between a cause and a condition is the element of foreseeability. Long v. Ponca City Hospital, Inc., 593 P.2d 1081, 1085 (Okla. 1979). "Foreseeability is an essential element of proximate cause . . . and it is the standard by which the proximate cause, as distinguished from the existence of a mere condition, is to be tested." Atherton v. Devine, 602 P.2d 634, 636 (Okla. 1979); Comments to Instruction No. 9.6 in the Oklahoma Uniform Jury Instructions - Civil (Second Edition). By instructing the jury that the injuries of Plaintiffs had to be a reasonably foreseeable result for the negligence to be the direct cause, the jury, in returning a verdict for Plaintiffs, had to conclude that the injuries of Plaintiffs were a reasonably foreseeable result of Defendant, Billy E. Alexander's negligence. Accordingly, they found Defendant, Billy E. Alexander's negligence was the proximate cause of Plaintiffs' injuries and not a mere condition. In light of the Court's "Direct Cause - Defined" Instruction, the Court concludes that a new trial is not warranted based upon the failure to submit Defendants' "condition versus cause" instruction.

Compensation for Permanent Injury

Defendants further argue that the Court erred in instructing the jury that it could consider "whether the injuries are permanent" as to Plaintiff, Annette A. Blanke. Defendants contend that the testimony of Mark A. Hayes, M.D., was not sufficient to create a jury question concerning whether Plaintiff's injuries were permanent in nature. Specifically, Defendants assert that Dr. Hayes' testimony did not establish permanent injury to a "reasonable certainty" as required by Tom P. McDermott, Inc. v. Birks, 395 P.2d 575, 576 (Okla. 1964), and Reed v. Scott, 820 P.2d 445, 449 (Okla. 1991).

This Court disagrees. As stated during the trial of this matter, the Court finds that the testimony of Dr. Hayes was sufficient to permit the jury to consider whether Plaintiff's injuries were permanent in nature. Dr. Hayes testified on page 16 of his deposition as to the shortening of femur. He also testified on page 21 as to the potential development of post-traumatic arthritis. Dr. Hayes further testified on page 22 as to soreness and some stiffness in the knee from fracture callous. Although Dr. Hayes testified on page 31 that Plaintiff, Annette A. Blanke, had not made any complaints of soreness or stiffness at the time she visited him, the Court finds that Dr. Hayes' testimony that she may see soreness and stiffness, together with the doctors' other testimony regarding the injuries, was sufficient to allow the jury to consider "whether the injuries are permanent."

Furthermore, in reaching its decision, the Court notes that

Defendants did not present any evidence to rebut the testimony of Dr. Hayes. Defendants simply argued that Dr. Hayes' testimony did not establish permanent damages to a reasonable certainty. Upon review of Dr. Hayes' testimony, the Court finds that the issue of permanent injuries was properly submitted to the jury.

Directed Verdict

Finally, Defendants argue that the Court erred in refusing to rule on their motion for directed verdict under Rule 50, Fed. R. Civ. P., on the issue of medical expenses and in allowing Plaintiff, Annette A. Blanke, to reopen the evidence to introduce her medical bills. Defendants contend that the Court, in considering their motion, was not to exercise its discretion, but was required to make a ruling as a matter of law. In addition, Defendants contend that the Court was not to weigh the evidence, but was to determine whether there was any evidence to support Plaintiff's claim for medical expenses. Because Plaintiff had failed to present the medical bills during her presentation of evidence, Defendants argue that they were entitled to a directed verdict on the claim for medical expenses.

Rule 50(a)(2) states that a motion for judgment as a matter of law "shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment." The purposes of such requirement are twofold: (1) to assure that the trial court has an adequate basis for its decision; and (2) to afford the adverse party the opportunity to correct any possible infirmities in the proof presented." 5A James W. Moore et al., Moore's Federal

Practice, ¶ 50.04, pp. 50-51--50-53 (2d ed. 1996). The Advisory Committee Note to the 1991 amendments to Rule 50 specifically states that the "articulation is necessary to achieve the purpose of the requirement that the motion be made before the case is submitted to the jury, so that the responding party may seek to correct any overlooked deficiencies in the proof." Prior to the 1991 amendments, the Tenth Circuit also noted that "[t]he purpose of a directed verdict is to allow the nonmoving party the opportunity to reopen its case and present additional evidence to cure a deficiency that otherwise would have prevented the case from reaching the jury." Grubb v. Fed. Deposit Ins. Corp., 868 F.2d 1151, 1160 n. 12 (10th Cir. 1989); see also, Anderson v. United Telephone Co., 933 F.2d 1500, 1503 (10th Cir. 1991).

In the instant case, Plaintiff, Annette A. Blanke, failed to introduce into evidence her medical bills. In the Court's view, such failure was clearly inadvertent. Because the purpose of Rule 50 is to allow an adverse party to cure any overlooked deficiencies, the Court finds that it did not err in allowing Plaintiff, Annette A. Blanke, to reopen her case and admit the medical bills.

Based upon the foregoing, Defendants' Motion for New Trial (Docket Entry #87-1) and Alternative Motion for Remittitur (Docket Entry #87-2) are **DENIED**.

ENTERED this 6th day of August, 1996.

Michael Burrage

MICHAEL BURRAGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

INTERNATIONAL MARINE & GAMING, INC., a Delaware corporation, and 552129 ONTARIO, LIMITED, an Ontario, Canada corporation,

Plaintiffs,

vs.

HELVETIA FINANCE, S.A.B.V.I., a British Islands corporation, HELVETIA FINANCE, S.A., a Swiss corporation, BURLINGAME AND FRENCH, a California partnership DAISY BURLINGAME, an individual, ELLIE FRENCH, an individual, JACK B. STOOKEY, an individual, ANDRE MOERLEN, an individual, and CARL L. GODFREY, an individual,

Defendants.

No. 95-C-626-K

ORDER

Now before this Court is the motion by Defendant Jack B. Stookey for summary judgment.

I. BACKGROUND

The instant litigation involves a dispute over a financial transaction. International Marine & Gaming, Inc. ("IMG") sought to build a card club in the City of Bell, California. IMG contracted with a financial broker, Daisy Burlingame, in order to secure financing for the project. Burlingame brokered an agreement between IMG and Helvetia Finance, S.A. ("Helvetia"), whereby the City of Bell would issue and Helvetia would purchase

approximately $40 million in bonds to fund the project. As part of the financing deal, Stookey, the American agent for Helvetia, requested from IMG a $100,000 "administrative fee . . . for purposes of processing the loan documents and other related expenses." (Br. Mot. Summ. J. Ex. I.) IMG arranged for the $100,000 to be paid to Helvetia from an account belonging to Plaintiff 552129 Ontario Ltd. Stookey agreed to refund the $100,000 "should Helvetia Finance, S.A., fail to complete the said loan commitment within six months from the above date." (Id.) Stookey added a personal guarantee of the $100,000.

The deal ultimately fell through. Plaintiffs assert that the City of Bell did not issue the bonds because Helvetia failed to produce financial information requested by the City of Bell as part of its due diligence. IMG demanded the return of the $100,000, and Stookey refused.

Plaintiffs filed this action to recover the $100,000 plus damages. Plaintiffs assert various causes of action against Stookey: conversion, breach of fiduciary duty, fraud, and breach of contract. Stookey seeks summary judgment on all claims and challenges 552129 Ontario's standing.

II. SUMMARY JUDGMENT STANDARD

Summary judgment, pursuant to Rule 56, Fed. R. Civ. P., is appropriate where "there is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter

of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); Windon Third Oil and Gas v. Federal Deposit Insurance Corporation, 805 F.2d 342, 345 (10th Cir. 1986), cert den., 480 U.S. 947 (1987). The Supreme Court explains:

> [T]he plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

Celotex, 477 U.S. at 322. A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of his pleadings, but must affirmatively prove specific facts showing there is a genuine issue of material fact for trial. In Anderson, the Court stated:

> The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

477 U.S. at 252.

III. DISCUSSION

A. Standing of 552129 Ontario to sue Stookey. Stookey contends that 552129 Ontario does not have standing to sue him under any of the claims asserted in the Complaint. Stookey maintains that he had no contractual relationship, nor even any contact, with 552129 Ontario. He states that the only connection between 552129 Ontario and Stookey was that 552129 Ontario

apparently supplied the $100,000 with which IMG paid Helvetia the administrative fee pursuant to the agreement between Helvetia and IMG. Stookey is correct. Plaintiffs present no valid evidence or argument to support standing by 552129 Ontario to sue Stookey under any of the causes of action in the Complaint. Accordingly, this Court holds that 552129 Ontario lacks standing to sue Stookey.

B. Conversion claim. Plaintiffs bring an action for unlawful conversion of the $100,000. Stookey argues that Plaintiffs cannot maintain this claim against him because the property allegedly taken is not the type of property covered by the tort of conversion. Conversion is an illegal taking of or an act of dominion over another's personal property in denial of or inconsistent with his rights therein. Welty v. Martinaire of Oklahoma, Inc., 867 P.2d 1273, 1275 (Okla. 1994); Shebester v. Triple Crown Insurers, 826 P.2d 603, 608 (Okla. 1992). The general rule in Oklahoma is that only *tangible personal property* may be converted. Id. In Welty, the Oklahoma Supreme Court cited the following definition of conversion: "'an unauthorized assumption and exercise of the right of ownership over *goods or personal chattels* of another.'" Welty, 867 P.2d at 1275 (citing Black's Law Dictionary, 4th Ed.). Here, as in Shebester, what Plaintiffs allege is "the right to recover money . . . which under Oklahoma law is considered *intangible personal property.*"

Id. (citing Perkins v. Oklahoma Tax Commission, 428 P.2d 328 (Okla. 1967)). See also Steenbergen v. First Fed. Sav. & Loan, 753 P.2d 1330, 1332 (Okla. 1987) (holding that conversion does not lie for a debt).[1] Cf. Sisler v. Smith, 267 P.2d 1081 (Okla. 1953) (holding that physician's removal of cash from patient's person without patient's consent would constitute conversion even if cash was taken for payment of bills accrued). Accordingly, this Court holds that Plaintiff's claim of an unlawful taking of the $100,000 administrative fee is not maintainable as common-law conversion.[2]

*C. **Breach of fiduciary duty claim.*** Stookey argues that he is entitled to summary judgment on Plaintiffs' claim of breach of fiduciary duty claim because Stookey did not have a fiduciary or comparable relationship with Plaintiffs. Stookey asserts that he never entered into any agreement with Plaintiffs to act as fiduciary, and he never occupied a position of special trust or responsibility toward Plaintiffs that would have entailed duties comparable to those of a fiduciary.

This Court agrees. The proposed deal between Helvetia and

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[1] Plaintiffs' attempt to preserve their conversion claim by arguing that the $100,000 was a "deposit" that was supposed to be put into an escrow account. This argument is unavailing. See discussion *infra* Part C.

[2] This Court's holding that Plaintiffs are not entitled to bring a conversion action in tort does not foreclose an analogous cause of action against Stookey in contract. See e.g., Thurlwell v. Rabbit, 235 P. 923 (Okla. 1925) (holding that under modern rule, action of assumpsit lies whenever one has money of another which he in equity and good conscience has no right to retain).

IMG was an arm's length transaction. There was no longstanding, special, or confidential relationship between Stookey and Plaintiffs that would have imposed any fiduciary-like duties upon him. Accordingly, Stookey could not have breached a fiduciary duty to Plaintiffs.

Plaintiffs attempt to endow Stookey with a fiduciary-like status by asserting that Stookey agreed to hold the $100,000 administrative fee in escrow. Plaintiffs contend that Stookey violated "a broker/escrow fiduciary duty when [he] failed to place the $100,000 Deposit into an escrow account." (Plaint. Resp. at 13.) Plaintiffs' assertion is without factual basis. None of the documents submitted with the pleadings characterize the $100,000 as a "deposit," and there is no mention in the documents of an agreement to place the $100,000 in escrow. Rather, the $100,000 is called an "Administrative Fee" in the letter of commitment, and its asserted purpose is for "processing the loan documents and other related expenses." (Br. Mot. Sum. J. Ex. I.) This purpose is not consistent with an escrow arrangement.[3] Hence, Plaintiffs have failed to establish the

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[3] Plaintiffs attempt to defeat Stookey's summary judgment motion though citation to the affidavit of James A. Everatt, President of IMG. Everatt states, "On behalf of 552129 Ontario, Limited, I executed a check as an advance on behalf of International Marine & Gaming, Ing. [*sic*], in the amount of $100,000 to Helvetia, S.A., which was to be placed into an escrow account." (Everatt Aff. ¶ 4, Plaint. Resp. Ex. F). Everatt and Plaintiffs provide no support for this contention that the $100,000 was to be placed in escrow and make no effort to rebut the strong inference to the contrary created by the letter of commitment. Therefore, this Court holds that

(continued...)

existence of a genuine issue of material fact as to the existence of an escrow arrangement governing the $100,000.

D. Fraud claim. Stookey argues that he is entitled to summary judgment on Plaintiffs' fraud claim because the misrepresentations alleged in the Complaint were not made by or attributable to him. Plaintiffs base their fraud claim, *inter alia*, on Stookey's alleged misrepresentations concerning the corporate history and financial strength of Helvetia. Stookey denies making any such representations, asserting that the alleged misrepresentations are attributable to Defendant Carl Godfrey with whom Stookey had no agency relationship.

Plaintiffs have presented sufficient evidence to establish at least a genuine issue of fact as to their fraud claim against Stookey. For example, Plaintiffs point to a letter from Burlingame to IMG quoting Stookey as making the following representations about Helvetia:

> [It] has been in business in excess of two hundred (200) years conducting bond issue financing, [it is] the sister corporation to one of the largest banks in Switzerland . . . [it] own[s] a European insurance company, a large real estate trust, and [is] a publicly traded company on the Swiss exchange.

(Plaint. Resp. Ex. P.) Plaintiffs also point to Stookey's

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[3](...continued)
Everatt's affidavit is insufficient to oppose Stookey's motion for summary judgment on this issue. See Thomas v. International Business Machines, 48 F.3d 478, 485 (10th Cir. 1995) (noting that "generalized, unsubstantiated, non-personal affidavits are insufficient to successfully oppose a motion for summary judgment.") (citing Stevens v. Barnard, 512 F.2d 876, 879 (10th Cir.1975)).

deposition which indicates that Stookey may have misrepresented Helvetia's ability to purchase the bonds to be issued by the City of Bell. (Stookey Depo. at 130:15-25, Plaint. Resp. Ex. D.)

E. Contract claim. Stookey contends that Plaintiff's contract claim was mooted by Stookey's discharge in bankruptcy. On September 26, 1995, Stookey filed for relief under Chapter 7 of the Bankruptcy Code. Normally, the automatic stay of Bankruptcy Code § 362, 11 U.S.C. § 362, stays an action in district court from proceeding against the debtor. However, a bankruptcy court has discretion to permit a liability determination on a creditor's claim to be reduced to judgment by another court of competent jurisdiction, while reserving for the bankruptcy court the determination on the issue of dischargeability. 11 U.S.C. § 523(c). On December 28, 1995, the bankruptcy court did just that. It granted Plaintiffs' motion for relief from automatic stay and permitted Plaintiffs to proceed with their action in this Court, reserving for the bankruptcy court its determination of dischargeability of Plaintiffs' claims until after this Court has determined liability. In re Stookey, No. 95-02987-C (Bankr. N.D. Okla. filed Dec. 28, 1995). Accordingly, IMG is not prevented by Stookey's bankruptcy filing from pursuing its claims against Stookey in this Court.

IV. CONCLUSION

For the reasons stated herein, Stookey's Motion for Summary Judgment is GRANTED in part and DENIED in part. This Court holds that 552129 Ontario Ltd. lacks standing to sue Stookey; therefore, summary judgment is GRANTED in favor of Stookey and against 552129 Ontario Ltd. as to all claims. Further, summary judgment is GRANTED in favor of Stookey and against IMG as to its claims of conversion and breach of fiduciary duty. However, Stookey's motion for summary judgment is DENIED as to IMG's fraud and contract claims. Accordingly, IMG may proceed with its fraud and contract claims against Stookey.

IT IS SO ORDERED THIS 5 DAY OF ~~JULY~~ August, 1996.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GARY J. MARAVIGLIA, d/b/a AAMCO TRANSMISSIONS,

Plaintiff,

vs.

AMERICAN STATES INSURANCE CO.

Defendant.

No. 95-C-807-K

JUDGMENT

In accordance with the jury verdict rendered on August 5, 1996, entered in favor of the defendant American States Insurance Company and against the plaintiff, Gary Maraviglia, judgment is hereby entered in favor of defendant on all claims.

ORDERED this 6 day of August, 1996.

TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOHN PAUL HANEY, JR.,

Plaintiff,

vs.

STANLEY GLANZ, et al.,

Defendants.

No. 96-CV-659-BU

ORDER

Before the Court for consideration are Plaintiff's civil rights complaint pursuant to 42 U.S.C. § 1983 and motion for leave to amend the complaint and to suppress illegally obtained evidence. On July 26, 1996, the Court granted Plaintiff's motion for leave to proceed in forma pauperis.

Plaintiff sues the State of Oklahoma and Tulsa County for alleged violations of his Fourth, Fifth, Sixth and Fourteenth Amendment rights. He alleges that Tulsa Police officers interrogated him in a coercive manner and sought to force him to confess. He further alleges that these officers took samples of his blood, hair, and saliva on the basis of an improper waiver of Miranda rights and in the absence of court appointed counsel.[1] Plaintiff seeks an order directing the dismissal of all charges and his immediate release from custody "on the grounds of intentional bad faith prosecution and wrongful defamation of character." (Docket #1.)

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[1] Plaintiff's complaint indicates that the police officers obtained samples of blood, hair and saliva pursuant to a court order.

In his motion for leave to amend Plaintiff restates the allegations in his complaint and adds that his court appointed public defender, Daman Cantrell, has failed to provide effective assistance of counsel. He contends that Mr. Cantrell has refused to file a motion to suppress the illegally obtained evidence.

The Prison Litigation Reform Act of 1996 (the Act), Pub.L. No. 104-134, § 805, 110 Stat. 1321 (1996) added a new section to the in forma pauperis statute entitled "Screening." Id. (to be codified at 28 U.S.C. § 1915A). That section requires the Court to review a complaint brought by a prisoner seeking redress from a governmental entity or officer to determine if the complaint is frivolous, malicious, or fails to state a claim upon which relief may be granted. In addition, the Act provides that a district court may dismiss an action filed in forma pauperis "at any time" if the court determines that the action is frivolous, malicious, or fails to state a claim on which relief may be granted. See id. § 804(a)(5) (amending 28 U.S.C. § 1915(d)) (to be codified at 28 U.S.C. § 1915(e)(2)(B)).

"The term 'frivolous' refers to 'the inarguable legal conclusion' and 'the fanciful factual allegation.'" Hall v. Bellmon, 935 F.2d 1106, 1108 (10th Cir. 1991) (quoting Neitzke v. Williams, 490 U.S. 319, 325, 327 (1989)). If a plaintiff states an arguable claim for relief, even if not ultimately correct, dismissal for frivolousness is improper. Id. at 1109. Inarguable legal conclusions include those against defendants undeniably immune from suit or those alleging infringement of a legal interest

which clearly does not exist. Id. A plausible factual allegation which lacks evidentiary support, even though it may not ultimately survive a motion for summary judgment, is not frivolous within the meaning of section 1915(e)(2)(B). Id.

After liberally construing Plaintiff's pro se complaint and the motion for leave to amend, see Haines v. Kerner, 404 U.S. 519, 520-21 (1972); Hall v. Bellmon, 935 F.2d 1106, 1100 (10th Cir. 1991), the Court concludes that Plaintiff's request for an order releasing him from custody can only be obtained by petition for a writ of habeas corpus. See Duncan v. Gunter, 15 F.3d 989, 991 (10th Cir. 1994), and cases cited therein. In Preiser v. Rodriguez, 411 U.S. 475, 500 (1973), the United States Supreme Court held that when a prisoner is challenging the very fact or duration of his imprisonment, and the relief he seeks is a determination that he is entitled to immediate relief or speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus. Therefore, Plaintiff's complaint does not raise a claim cognizable in this civil rights action and must be dismissed sua sponte pursuant to section 1915(e)(2)(B).

Plaintiff's motion for leave to amend the complaint to allege a claim against Mr. Cantrell must be denied as futile. "The conduct of counsel, either retained or appointed, in representing clients, does not constitute action under color of state law for purposes of a section 1983 violation." Bilal v. Kaplan, 904 F.2d 14, 15 (8th Cir. 1990); see also Lemmons v. Morris, 39 F.3d 264, 266 (10th Cir. 1994). Cf., Tower v. Glover, 467 U.S. 914, 920

(1984) (citing Polk County v. Dodson, 454 U.S. 312, 325 (1981)) (public defender does not act under color of state law when representing an indigent defendant in a state criminal proceeding). Moreover, Plaintiff has not alleged any grounds for the exercise of diversity jurisdiction in this case. See Lemmons, 39 F.3d at 266.

ACCORDINGLY, IT IS HEREBY ORDERED that Plaintiff's motion for leave to amend and to suppress all illegally obtained information (docket #3) is DENIED and this action is DISMISSED without prejudice as it lacks an arguable basis in law. See 28 U.S.C. § 1915(e)(2)(B). The Clerk shall MAIL to Plaintiff a copy of the complaint and motion to amend and to suppress.

IT IS SO ORDERED this 6th day of August, 1996.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

LOUSI L. PEEK
(ssn: 329-68-9691)

Plaintiff,

v.

SHIRLEY S. CHATER,
Commissioner of Social Security,

Defendant.

No. 95-C-714-J

JUDGMENT

This action has come before the Court for consideration and an Order affirming the disability determination of the Commissioner has been entered. Judgment for the Defendant and against the Plaintiff is hereby entered pursuant to the Court's Order.

It is so ordered this 6 day of August 1996.

Sam A. Joyner
United States Magistrate Judge

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UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

LOUIS L. PEEK,
(SSN: 329-68-9691)

Plaintiff,

v.

SHIRLEY S. CHATER,
Commissioner of Social Security,

Defendant.

No. 95-C-714-J

ORDER[1/]

Now before the Court is Plaintiff's appeal of the Commissioner's decision denying him Supplemental Security Income. The Administrative Law Judge ("ALJ"), Glen E. Michael, found that Plaintiff was not disabled because (1) Plaintiff retained the Residual Functional Capacity ("RFC") to perform at least sedentary work, and (2) there were significant jobs in the national economy which Plaintiff could still perform despite his limitations.

Plaintiff argues that (1) the ALJ's determination that Plaintiff could perform sedentary work is not supported by substantial evidence, and (2) the ALJ erred by relying on the medical-vocational guidelines ("the grids") rather than relying on the testimony of a vocational expert. The Court finds that the ALJ's determination that Plaintiff can perform the demands of sedentary work is supported by substantial

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[1/] This Order is entered in accordance with 28 U.S.C. § 636(c) and pursuant to the parties' Consent to Proceed Before United States Magistrate Judge, filed August 29, 1995.

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evidence. The Court also finds that the ALJ did not err by applying the grids in this case. Consequently, the Commissioner's denial of benefits is **AFFIRMED**.

I. STANDARD OF REVIEW

A disability under the Social Security Act is defined as the

> inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment. . . .

42 U.S.C. § 423(d)(1)(A). A claimant will be found disabled

> only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work in the national economy. . . .

42 U.S.C. § 423(d)(2)(A). To make a disability determination in accordance with these provisions, the Commissioner has established a five-step sequential evaluation process.[2/]

The standard of review to be applied by this Court to the Commissioner's disability determination is set forth in 42 U.S.C. § 405(g), which provides that "the

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[2/] Step one requires the claimant to establish that he is not engaged in substantial gainful activity as defined at 20 C.F.R. §§ 404.1510 and 404.1572. Step two requires the claimant to demonstrate that he has a medically severe impairment or combination of impairments that significantly limit his ability to do basic work activities. See 20 C.F.R. § 1521. If claimant is engaged in substantial gainful activity (step one) or if claimant's impairment is not medically severe (step two), disability benefits are denied. At step three, claimant's impairment is compared with those impairments listed at 20 C.F.R. Pt. 404, Subpt. P, App. 1 (the "Listings"). If a claimant's impairment is equal or medically equivalent to an impairment in the Listings, claimant is presumed disabled. If a Listing is not met, the evaluation proceeds to step four, where the claimant must establish that his impairment or combination of impairments prevents him from performing his past relevant work. A claimant is not disabled if he can perform his past work. If a claimant is unable to perform his previous work, the Commissioner has the burden of proof at step five to establish that the claimant, in light of his age, education, and work history, has the residual functional capacity ("RFC") to perform an alternative work activity in the national economy. If a claimant has the RFC to perform an alternate work activity, disability benefits are denied. See, 20 C.F.R. § 404.1520; Bowen v. Yuckert, 482 U.S. 137, 140-142 (1987); and Williams v. Bowen, 844 F.2d 748, 750-53 (10th Cir. 1988).

finding of the Commissioner as to any fact, if supported by substantial evidence, shall be conclusive." Substantial evidence is that amount and type of evidence that a reasonable mind will accept as adequate to support the ALJ's ultimate conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Williams, 844 F.2d at 750. In terms of traditional burdens of proof, substantial evidence is more than a scintilla, but less than a preponderance. Perales, 402 U.S. at 401. Evidence is not substantial if it is overwhelmed by other evidence in the record. Williams, 844 F.2d at 750.

To determine whether the Commissioner's decision is supported by substantial evidence, the Court will not undertake a *de novo* review of the evidence. Sisco v. U.S. Dept. of Health and Human Services, 10 F.3d 739, 741 (10th Cir. 1993). The Court will not reweigh the evidence or substitute its judgment for that of the Commissioner. Glass v. Shalala, 43 F.3d 1392, 1395 (10th Cir. 1994). The Court will, however, meticulously examine the entire record to determine if the Commissioner's determination is rational. Williams, 844 F.2d at 750; Holloway v. Heckler, 607 F. Supp. 71, 72 (D. Kan. 1985).

In addition to determining whether the Commissioner's decision is supported by substantial evidence, it is also this Court's duty to determine whether the Commissioner applied the correct legal standards. Washington v. Shalala, 37 F.3d 1437, 1439 (10th Cir. 1994). The Commissioner's decision will be reversed when she uses the wrong legal standard or fails to clearly demonstrate reliance on the correct legal standards. Glass, 43 F.3d at 1395.

II. DISCUSSION

At the time of the hearing below, Plaintiff was a 31 year old male with a 9th grade education. Plaintiff has received some vocational training as a welder. Plaintiff's past relevant work was primarily that of a laborer. Plaintiff has worked in construction, as an auto mechanic, in a machine shop, at a truck stop, as a gas station attendant, and as an ice cream store clerk. Most of Plaintiff's past relevant work was in the "heavy" exertional category. *R. at 32, 83-94.* See 20 C.F.R. § 404.1567(d). Plaintiff alleges that he is disabled because of (1) a screw in his right ankle, (2) a stroke and chest pains, (3) stress, and (4) problems with dislocation of his left shoulder. *R. at 47, 80, 95-102.*

A. Screw in Right Ankle

Plaintiff states that he has a three inch screw in his right ankle. *R. at 45, 95-102.* Plaintiff's friend, Terry Rodman, testified at the hearing before the ALJ that because of this screw, Plaintiff has problems walking, especially when the weather changes. Ms. Rodman testified further that "sometimes [Plaintiff's right ankle] twists on him," and his right ankle "bothers him sometimes." *R. at 45.*

Jack H. Brown, M.D., examined Plaintiff on February 15, 1994 (i.e., more than two months after Plaintiff's application of SSI benefits was filed). Plaintiff reported to Dr. Brown that he broke his ankle in 1982 and had to have a screw placed in his ankle. According to Dr. Brown's report, "[n]o gross orthopedic deformities [were] noted in [Plaintiff's] lower extremities." *R. at 136.* Dr. Brown found that Plaintiff's gait is "normal for speed, stability, and safety." Id. Plaintiff was also "able to walk

on his heels, as well as his toes." Id. The flexion, inversion and eversion in Plaintiff's right ankle was normal, without any limitation. *R. at 137-138.* Thus, Dr. Brown found no limitations whatsoever caused by the screw in Plaintiff's right ankle.

Dr. Brown's assessment is also confirmed by a Residual Functional Capacity Assessment ("RFC") performed by Vallis D. Anthony, M.D. on March 4, 1994 and by Carmen Bird-Pico, M.D. on June 13, 1994. *R. at 59-66.* According to both of these doctors, Plaintiff's RFC is in no way limited by an impairment to his right ankle. Id.

It is also significant that there is absolutely no medical evidence in the record regarding the placement of a screw in Plaintiff's right ankle. Furthermore, no doctor has ever placed any limitation on Plaintiff as a result of having a screw in his right ankle or because of orthopedic changes in his right ankle. Plaintiff was also apparently able to work for approximately 11 years (i.e., 1982 to 1993) with a screw in his right ankle. Other than Ms. Rodman's brief description of Plaintiff's problem with his right ankle, Plaintiff's testimony itself contains no description of how Plaintiff's activities are limited by an impairment in his right ankle. Also, as discussed below, there is evidence in the record that Plaintiff was able to mow the lawn and rake small piles in his yard.

The ALJ found that any impairment caused by the screw in Plaintiff's right ankle, standing alone or in combination with Plaintiff's other alleged impairments, was not severe. *R. at 13.* Based on the above-described record, the Court finds that there is substantial evidence to support the ALJ's conclusion. Neither Plaintiff's nor

his friend's statements alone are enough to establish the existence of a physical impairment. See 20 C.F.R. §§ 404.1512(a), 404.1528(a) & 404.1529(a).

B. Stroke/Chest Pains

Plaintiff states that he had a stroke in 1990. Plaintiff told Dr. Brown that the stroke was the result of his cocaine use/addiction. *R. at 135.* As with the screw in Plaintiff's right ankle, there is nothing in the medical record regarding Plaintiff's stroke. Dr. Brown states in his report that the stroke had not left Plaintiff with "much residual." Id. This statement is in the "past medical history" section of Dr. Brown's report. Thus, it is not clear whether Dr. Brown's statement is a statement based on his assessment of Plaintiff or if it is a statement Plaintiff made as a part of his medical history. In his report, however, Dr. Brown makes no indication whatsoever that Plaintiff suffers any residual impairment as a result of his alleged stroke.

More importantly, Plaintiff himself testified that he is fully recovered from the stroke. The following testimony is particularly relevant:

> Q . . . And did [the stroke] leave any paralysis or any problems?
>
> A They said that they couldn't really tell for sure, mainly because I come out of it pretty well but they said something could reoccur out of it later on down the line?
>
> Q But you're pretty much fully recovered.
>
> A Yes.

R. at 34. Thus, Plaintiff has failed to establish a severe impairment caused by or related to his alleged stroke in 1990. The Court finds, therefore, that there is substantial evidence to support the ALJ's conclusion that any impairment caused by

Plaintiff's alleged stroke is not severe, either standing alone or in combination with Plaintiff's other alleged impairments.

Plaintiff also complained at the hearing of unspecific "chest pains" which were "pretty bad" and becoming more frequent. *R. at 35, 36-37.* Plaintiff's friend, Ms. Rodman, testified that Plaintiff's chest pains cause him to cough and cause him shortness of breath. Dr. Brown examined Plaintiff and found his heart to be regular without murmur, gallop or rub. *R. at 135-39.* The Court finds, therefore, that there is substantial evidence to support the ALJ's conclusion that any impairment caused by Plaintiff's chest pains is not severe, either standing alone or in combination with Plaintiff's other alleged impairments.

C. Stress

Plaintiff states that he feels stressed as a result of pain and his lack of financial resources. *R. at 68, 103-106.* Plaintiff's testimony offers no details on the effect or limitations caused by the "stress" Plaintiff feels. An unknown doctor with a Ph.D.[3/] completed a Psychiatric Review of Plaintiff on June 10, 1994. *R. at 67-75.* The doctor concluded that Plaintiff has "no medically determinable impairment" as a result of the stress he was feeling. Id. Dr. Brown also reported that at the time of his examination of Plaintiff, Plaintiff was alert, oriented and in no acute distress. *R. at 135.* There is also no evidence in the record that Plaintiff ever attempted to obtain treatment to combat the effects of the stress he was feeling.

[3/] The report is signed only with the initials C.M.K.

After reviewing the record, including Plaintiff's testimony, the ALJ conducted his own Psychiatric Review. *R. at 20-22.* The ALJ determined that Plaintiff did have a mild, situational "affective disorder," which is a "disturbance of mood, accompanied by a full or partial manic depressive syndrome." The ALJ determined that this disorder only caused "slight" restrictions in Plaintiff's activities of daily living, "no" difficulties in maintaining social functioning, "no" episodes of deterioration or decompensation in work or work-like settings. The ALJ found that Plaintiff's disorder "seldom" caused deficiencies of concentration, persistence or pace resulting in failure to complete tasks in a timely manner. Id. These findings are supported by substantial evidence in the record. The Court finds, therefore, that the ALJ's conclusion that Plaintiff's mental stress would have such a minimal effect on Plaintiff that the stress would not be expected to interfere with his ability to work is supported by substantial evidence.

D. Shoulder Dislocations

1. **The ALJ's Determination That Plaintiff Can Perform Sedentary Work Is Supported by Substantial Evidence**

Plaintiff has problems with his left shoulder dislocating. Plaintiff claims that as a result of this problem, he is unable to use his left arm and he is, therefore, unable to work. After examining all of the evidence, the ALJ concluded that despite the impairment in Plaintiff's left arm, Plaintiff retains the residual functional capacity to perform sedentary work. The ALJ then applied the grids to determine that substantial jobs existed in the national economy which Plaintiff could perform. Plaintiff argues

that there is not substantial evidence in the record to support the ALJ's conclusion that he can perform sedentary work. Plaintiff also argues that the ALJ erred by applying the grids and not requiring the testimony of a vocational expert.

Plaintiff first dislocated his left shoulder in October 1992 when he fell off a dirt bike. Directly following the accident, Plaintiff went to the emergency room at Saint Francis Hospital in Tulsa, Oklahoma. The emergency room doctor relocated Plaintiff's left shoulder and noted that there was no evidence of any traumatic fractures. A post-relocation X-ray was taken and the X-ray showed "[n]o evidence of significant radiographic abnormality." *R. at 33, 117-122.* Plaintiff was not seen again in 1992 for his left shoulder. Plaintiff continued to work full time without any absences from October 1992 until July 1993, when the gas station he was working for laid him off. *R. at 83, 95.*

Plaintiff dislocated his shoulder three times in 1993. In June 1993, eight months after his first dislocation, Plaintiff was seen at the Tulsa Regional Medical Center ("TRMC") for a dislocated left shoulder. Plaintiff dislocated his shoulder while mowing the lawn. The mower apparently pulled Plaintiff's left arm very hard. *R. at 130-34.* In September 1993, Plaintiff was seen again at TRMC for a dislocated left shoulder. Plaintiff dislocated his shoulder while trying to pull a door closed. The emergency room doctor relocated Plaintiff's arm and noted that Plaintiff's grip strength was good and he had no sensory loss. *R. at 127-29.* In November 1993, Plaintiff was again seen at TRMC for a dislocated left shoulder. Plaintiff told the emergency room doctor that he dislocated his shoulder while mowing the lawn and

trying to pick up a heavy piece of metal. Plaintiff's left shoulder was relocated and a post-relocation X-ray was taken. The X-ray revealed an unremarkable left shoulder. There was no evidence of a fracture. The joint spacing was preserved. There was no soft tissue calcification and the bone density in the area was normal. *R. at 123-126.*

According to the medical record, Plaintiff was seen once in 1994 and once in 1995 for a dislocated left shoulder. The only evidence of these two dislocations is two sheets of TRMC discharge instructions from December 1994 and January 1995. These discharge instructions indicate that Plaintiff had been seen for a shoulder dislocation. No other information about these dislocations is contained in the medical record. *R. at 33-34, 148-49.* Plaintiff testified that the December 1994 dislocation was caused while he was trying to move a 40 pound plant. Plaintiff picked up the plant and while trying to move it, he fell, hit a wall, and his left shoulder dislocated. *R. at 42.* The January 1995 dislocation was caused during some horseplay with friends. Plaintiff testifies, however, that his friend barely touched him and his left shoulder dislocated. *R. at 42.*

After filing his application for SSI benefits, Plaintiff worked from April 24, 1994 to May 11, 1994 at Armin Plastic. The record contains no description of the type of work performed by Plaintiff at Armin Plastic. Plaintiff states that he had a left shoulder dislocation on May 6, 1994 and on May 11, 1994. Plaintiff states that these dislocations occurred in his sleep. There is, however, no medical evidence regarding these alleged dislocations. Plaintiff apparently did not go to the emergency

room for these dislocations. Plaintiff states, however, that Armin Plastics told him that he could not return to work without a note from a doctor saying that Plaintiff is able to work. *R. at 109.*

Plaintiff's predominate hand is his right hand, not his left. *R. at 36.* Plaintiff testified that he does go out in the yard and picks up lumber and rakes small piles of debris and picks them up. *R. at 40.* Plaintiff also states that he can tie his shoes, but he cannot lift his left arm above his head. *R. at 35-36.* Plaintiff testified that he needs help washing his hair and cooking because he is afraid that his shoulder might dislocate if he does these things. Plaintiff's friend, Ms. Rodman, testified that she does help Plaintiff wash his hair and she does cook for him.[4/] *R. at 39, 43.* During the day, Plaintiff visits with friends, plays cards, plays Nintendo, and does yard work. *R. at 38, 44-45.*

A Residual Functional Capacity Assessment ("RFC") was performed by Vallis D. Anthony, M.D. on March 4, 1994 and by Carmen Bird-Pico, M.D. on June 13, 1994. *R. at 59-66.* Both doctors had identical findings. They determined that Plaintiff is capable of performing the demands of light work. That is, Drs. Anthony and Bird-Pico found that Plaintiff could (1) occasionally lift 20 pounds; (2) frequently lift 10 pounds; and (3) stand, walk and sit for six hours out of an eight hour day, with normal breaks. Drs. Anthony and Bird-Pico also determined that Plaintiff had an unlimited ability to push or pull with his hands and feet. The only limitation of

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[4/] There is no explanation in the record why Plaintiff cannot wash his hair with his right hand or do some light cooking with his right hand.

Plaintiff's ability to perform light work was that he could do no overhead reaching due to a decreased range of motion in his left arm/shoulder. Id.

The RFC assessments are confirmed by Dr. Brown's report. At the time Plaintiff saw Dr. Brown on February 15, 1994, he was taking no medications for any of his alleged impairments. Dr. Brown found no swelling, redness or other deformity of the left shoulder joint. There was, however, some tenderness and Plaintiff was not able to put his left hand behind his back. Dr. Brown found that Plaintiff's grip strength in his left hand was decreased. Nevertheless, Plaintiff's dexterity with fine and gross manipulation was good. Plaintiff is not, however, able to lift very much with his left shoulder. Plaintiff had 70 out of 110 degrees abduction in the prone position and 80 out of 160 degrees abduction in the supine position. Plaintiff had 30 out of 30 degrees of extension and 80 out of 160 degrees flexion. These findings are consistent with the finding that Plaintiff cannot reach over his head. *R. at 135-39.*

The Court finds that the above-described record provides substantial evidence to support the ALJ's conclusion that Plaintiff can perform the demands of sedentary work.[5/] The only evidence detracting from the ALJ's conclusion is a report from Dr. Gary R. Davis, M.D., which the ALJ rejected.

Dr. Davis' report is undated, handwritten, and illegible in spots. The report consists of four sentences, one of which is a customary closing sentence offering

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5/ Sedentary work "involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met." 20 C.F.R. § 404.1567(b).

additional help if needed. Dr. Davis states that Plaintiff needs surgery on his left shoulder and that Plaintiff is "unemployable and totally disabled in his present state." *R. at 146.* There is no indication that Dr. Davis examined Plaintiff. There is no indication that Dr. Davis performed any tests on Plaintiff. Dr. Davis provides nothing in support of his ultimate conclusions. In short, Dr. Davis' letter is the type of conclusory medical opinion which the ALJ was justified in rejecting. See Frey v. Bowen, 816 F.2d 508, 513 (10th Cir. 1987) (holding that a treating physician's opinion may be rejected "if it is brief, conclusory, and unsupported by medical evidence."); 20 C.F.R. § 416.927.

2. The ALJ Did Not Err by Relying on the Grids

The medical/vocation guidelines (i.e., grids) are used by the Commissioner to determine whether there are a significant number of jobs in the national economy which a claimant can perform in light of his RFC, age, education and work experience. See 20 C.F.R., Pt. 404, Subpt. P, App. 2. The grids, when they can be applied, are a shortcut that eliminates the need to obtain testimony from a vocational expert. "The grids set forth presumptions regarding whether jobs exist in significant numbers in the national economy given the particular limitations possessed by the claimant." Trimiar v. Sullivan, 966 F.2d 1326, 1332 (10th Cir. 1992). When a claimant falls within a "not disabled" grid category, the Commissioner presumes that there are a significant numbers of jobs in the national economy that the claimant can perform. Id. In short, the grids allow the Commissioner to satisfy, with a presumption, her burden of proof at Step Five of the sequential evaluation process.

There are two situations in which the grids may not be applied. The grids may not be applied when a claimant's RFC does not exactly match a particular exertional category. This occurs most often when the claimant is not able to perform the full range of work required by a particular exertional category. For example, if a claimant cannot perform all the demands of light work, he falls somewhere between the sedentary and the light exertional categories. In such a case, it would be unfair to apply the grid for the light exertional category. Trimiar, 966 F.2d at 1332-33.

The Court has already affirmed the ALJ's conclusion that Plaintiff could perform the full range of exertional demands required by sedentary work. The Court's conclusion is supported by the Tenth Circuit's holding in Trimiar and Social Security Ruling 83-12. In Trimiar, plaintiff had an accident which left him with a permanent, "**partial**" impairment of his right arm. Despite this right arm impairment, the ALJ in that case determined that plaintiff could still perform the demands of light work. The Tenth Circuit affirmed the ALJ's conclusion. Trimiar, 966 F.2d at 1327. Referring to those individuals who have lost the use of an upper extremity due to amputation, Social Security Ruling 83-12 states as follows:

> Experience with persons who have lost the use of an upper extremity has shown that their potential occupational base is between the occupational bases for Table No. 1 (sedentary work) and Table No. 2 (light work). While individuals with this impairment have been known to perform selected occupations at nearly all exertional levels, the total number of occupations within their RFC's is less than the number represented by a full or wide range of light work.

SSR 83-12. Thus, even an amputee is typically considered to be able to perform the exertional demands of sedentary work. Nothing in the record suggests that Plaintiff's impairment is more severe than that of an amputee, who can typically perform the exertional demands of sedentary work.

The grids also may not be applied where nonexertional limitations are present. The occupational base presumed by the grids only takes into account the exertional demands of a job. "The presence of nonexertional [impairments] reduces the potential occupational base reflected in the grids. For example, a claimant may possess nonexertional limitations in his manual dexterity which limit his ability to perform tasks with his fingers and fingertips. These nonexertional limitations reduce the claimant's potential occupational base as set forth in the grids." Trimiar, 966 F.2d at 1333. When nonexertional impairments are present, a vocational expert must be called to determine whether jobs exist for someone with the claimant's precise mix of exertional and nonexertional impairments. Id.

As SSR 83-12 and SSR 82-51 demonstrate, individuals who loose the use of an upper extremity are generally not expected to perform sedentary work because most unskilled sedentary jobs require good use of both hands. Persons who loose the use of an upper extremity also loose the ability to manipulate objects bimanually (i.e., with both hands). This often reduces the ability to perform the fine manipulation of objects required by many sedentary jobs. Such a non-exertional limitation would erode the occupational base of the sedentary grid and require testimony from a vocational expert.

There is substantial evidence in the record that, despite the impairment to his left arm, Plaintiff retains the manual dexterity to perform the fine manipulation of objects with both hands. Dr. Brown specifically concluded that Plaintiff's dexterity with fine and gross manipulation was good, but Plaintiff just could not lift very much with his left arm. *R. at 135-36.* Dr. Brown also found that Plaintiff could effectively oppose his thumb to his finger, manipulate small objects, and grasp tools such as a hammer. *R. at 139.* Dr. Brown also performed tests on Plaintiff's left elbow, left wrist and the thumb and fingers on Plaintiff's left hand. All of these tests produced normal results. *R. at 138-39.* The record also indicates that Plaintiff (1) can tie his shoes with his left hand, and (2) plays Nintendo and cards during the day. *R. at 35, 44-45.* These activities in and of themselves require some dexterity and fine manipulation. The Court finds, therefore, that Plaintiff does not suffer from a nonexertional impairment as a result of a loss of fine manipulation or manual dexterity skills.

The only other relevant nonexertional impairment in this case is pain. Neither the Plaintiff's testimony nor the medical record establish that Plaintiff is in any significant pain as a result of his left shoulder, except when it dislocates. Plaintiff is currently taking no medication for pain. The only pain medications prescribed have been short term prescriptions, which were prescribed by the emergency room doctors after a shoulder dislocation. In short, there is no evidence in the record that Plaintiff's pain significantly reduces his ability to perform the full range of sedentary work.

The Court finds that there are no nonexertional impairments present in this case, which in any way significantly limit Plaintiff's ability to perform the full range of sedentary work. The ALJ was not, therefore, precluded from relying on the grids in this case.

3. Plaintiff's Need For Surgery

Dr. Davis stated in his conclusory report that Plaintiff needed surgery on his left shoulder to keep it from dislocating. *R. at 146.* The later emergency room records also indicate that Plaintiff may have been attempting to obtain surgery in Oklahoma City. Plaintiff testified, however, that the doctors he went to see would not perform the surgery because (1) Plaintiff had a reported history of stroke, (2) the doctors wanted Plaintiff to see a heart specialist because of the reported stroke, and (3) Plaintiff could not afford a heart specialist or shoulder surgery because he has no income or insurance. *R. at 44.* Dr. Brown, who conducted an examination of Plaintiff, made no mention of the need for corrective surgery. *R. at 135-39.*

If a claimant is found to be disabled under the five step sequential evaluation process, the Commissioner may then consider whether there are any procedures, including surgery, by which the claimant may lessen the impairment(s) causing the claimant's disability. If there are, the claimant is expected to undergo these procedures, and a refusal to do so may result in a denial of benefits. If, however, a claimant cannot reasonably afford to undergo a procedure, like surgery, then the Commissioner may not deny benefits based on that indigent claimant's refusal to undergo a procedure that might lessen his or her impairment(s). Teter v. Heckler,

775 F.2d 1104, 1107 (10th Cir. 1985); Tome v. Schweiker, 724 F.2d 711, 714 (8th Cir. 1984); Dawkins v. Bowen, 848 F.2d 1211, 1213 (11th Cir. 1988); Lovelace v. Bowen, 813 F.2d 55, 59 (5th Cir. 1987); SSR 82-59 (a person who otherwise meets the disability criteria may not be denied benefits for failing to obtain treatment he cannot afford).

Here, the claimant was not found to be disabled and then denied SSI benefits because he refused to obtain surgery that might correct his left shoulder impairment. Rather the ALJ found, and the Court has affirmed that finding, that despite the fact that Plaintiff's shoulder dislocates he can perform a full range of sedentary work. It may be true that surgery would prevent Plaintiff's shoulder from dislocating as easily as it does now.[6/] That fact alone does not establish that, without surgery, Plaintiff cannot perform any work in the national economy. There are undoubtedly many individuals who work despite the fact that they might need some type of surgery to correct some type of ailment. These people work until either (1) they can afford the surgery, (2) they can obtain insurance that will cover the surgery, or (3) they can obtain assistance from public sources such as Medicaid.

The Commissioner's disability determination is **AFFIRMED**.

[6/] The medical record does not, however, contain any reliable information regarding whether Plaintiff's shoulder problem is operable or whether surgery would solve the problem with Plaintiff's left shoulder.

IT IS SO ORDERED.

Dated this 6 day of August 1996.

Sam A. Joyner
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOSEPH D. HORSECHIEF,

Plaintiff,

vs.

CLIFFORD E. HOPPER, et al.,

Defendants.

No. 96-C-0143-BU

ORDER

This matter comes before the Court on Defendants' motion to dismiss. Plaintiff, a pro se litigant, has neither responded nor provided the Court with his new address since June 6, 1996.

Plaintiff's failure to respond to Defendant's motion to dismiss constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 7.1.C.[1]

ACCORDINGLY, IT IS HEREBY ORDERED that Defendant's motion to dismiss is GRANTED and that this case is hereby DISMISSED WITH PREJUDICE.

IT IS SO ORDERED this 6th day of August, 1996.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

[1]Local Rule 7.1.C reads as follows:

Response Briefs. Response briefs shall be filed within fifteen (15) days after the filing of the motion. Failure to timely respond will authorize the court, in its discretion, to deem the matter confessed, and enter the relief requested.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RUSSELL GORDON WOODS)
)
Petitioner,)
)
vs.) No. 95-C-225-B
)
DENISE SPEARS, (Warden) and)
THE ATTORNEY GENERAL OF THE)
STATE OF OKLAHOMA)
Respondents.)

REPORT AND RECOMMENDATION

Before the undersigned United States Magistrate Judge for report and recommendation is Petitioner's MOTION TO CONSOLIDATE CASES filed February 14, 1996 [Dkt. 4] and Respondent's MOTION TO DISMISS FOR FAILURE TO EXHAUST STATE REMEDIES filed February 27, 1996 [Dkt. 6].

Petitioner's motion was presented to the Court by way of correspondence, which the Court treated as a motion to consolidate. A copy was mailed to the Attorney General of the State of Oklahoma who, by minute order dated February 15, 1996, was directed to respond to the motion by March 4, 1996. As of the date of this report, the Attorney General has not responded. On February 27, 1996, Respondents filed a motion to dismiss.

Petitioner is an inmate in the Oklahoma Department of Corrections serving two consecutive ten year sentences for the crimes of Larceny of Merchandise from a Retailer in the Amount of $50.00 to $500.00 After Former Conviction of One Felony, Tulsa County Case Nos. CRF-93-5420 and CRF-94-327. Petitioner has filed two

petitions for writ of habeas corpus in this district, this case and Case No. 95-C-308-H. which he seeks to consolidate. According to Petitioner, the issues in both cases are identical.[1] The only distinction between the cases is that Case No. 95-C-308-H specifically addresses Tulsa County Case No. CRF-93-5420, which is the sentence Petitioner is currently serving, and this case addresses Tulsa County Case No. CRF-94-327. Petitioner does not commence serving the sentence for the conviction involved in this case until he has served the sentence in the other case.

In Case No. 95-C-308-H there has been an evidentiary hearing before United States Magistrate Judge John Leo Wagner, a report and recommendation issued, objections filed, and an order entered by United States District Court Judge Sven Erik Holmes adopting in part and modifying in part the recommendations. In the order in Case No. 95-C-308-H, filed May 8, 1996, the Court:

> hold[s] this case in abeyance for 120 days from the entry of this order to allow the Oklahoma Court of Appeals to grant Petitioner leave to appeal and provide him assistance of counsel. If the court grants such leave, Petitioner's writ shall be dismissed. If the Oklahoma court fails to grant Petitioner his appeal within the time specified and/or does not provide him with competent counsel, in accordance with Abels, the writ shall issue discharging Petitioner.

Case No. 95-C-308-H, Dkt. 28, p. 4-5. The docket in Case No. 95-C-308-H reflects that there have been no filings by the State seeking appeal or other relief from the Court's Order.

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[1] Grounds asserted are ineffective assistance of counsel and improper enhancement of sentence.

In their Motion to Dismiss for failure to exhaust, Respondents acknowledge that identical claims are raised in 95-C-308-H and the possibility that Petitioner may be granted relief on the "exact issues and the exact facts Petitioner now brings before this Court." [Dkt. 6, p.5]. Since all involved have asserted that the issues raised in the two petitions are identical and since the Court has practically resolved the issues in Case No. 95-C-308-H, Petitioners suggestion that consolidation of the cases "would save the court and all parties involved valuable time as well as tax payer dollars" is well taken. Consolidation of the two cases is therefore appropriate.

The Court has reviewed Respondents' arguments in favor of dismissal of this case for Petitioner's failure to exhaust state remedies. Respondents, citing *Naranjo v. Ricketts*, 696 F.2d 83 (10th Cir. 1982), acknowledge that exhaustion of state remedies is a matter of comity rather than jurisdiction. Under the doctrine of comity, a federal court should defer action on claims properly within its jurisdiction until a state court with concurrent power has had an opportunity to consider the matter. *Id.*, at 86.

In the present case Petitioner asserts that this Court should not require him to exhaust state remedies because to do so would be futile. He comes to that conclusion because he was denied relief in his other case by the Oklahoma Court of Criminal Appeals for failure to comply with procedural prerequisites. He pled guilty to both his cases five minutes apart, had the same attorney for both cases, received the same punishment for the same charge, and the grounds upon which he seeks relief are the same. He reasons that because both cases are identical he would be

denied relief in this case as well. Respondent argues that because Petitioner may be granted relief in his other federal habeas petition on his other conviction, the Oklahoma Courts "may follow this Court's example and provide relief in the present case, providing Petitioner properly exhausts his claims in the State Court." [Dkt. 6, p. 5].

This Court sees no merit in requiring Petitioner to follow such a circuitous route to obtain the relief which the Court has determined he must receive in Case No. 95-C-308-H on identical facts. Moreover, since Judge Holmes has determined that Petitioner should be discharged if the Oklahoma Court fails to grant Petitioner his appeal within the time specified by the order or does not provide him with competent counsel, the dismissal of this petition for failure to exhaust would not only be wasteful of time and effort, but it would be destructive of the remedy fashioned by Judge Holmes. Accordingly Respondents' motion to dismiss should be denied.

Since the parties acknowledge that the petitions in Case No. 95-C-308-H and this case, No. 95-C-225-B, are based on identical facts, the relief ordered by Judge Holmes in Case No. 95-C-308-H should be granted in this case as well. It is therefore the Recommendation of the undersigned United States Magistrate Judge that this case be consolidated with Case No. 95-C-308-H and be subject in all respects to the May 8, 1996 Order. Case No. 95-C-308-H is being held in abeyance for 120 days from the entry of that order to allow the Oklahoma Court of Criminal Appeals to grant Petitioner leave to appeal and provide him assistance of counsel. Although the 120 days will expire September 5, 1996, there is sufficient time remaining to enable Tulsa

County Case No. CRF-94-327 to be joined with the appeal of Tulsa County Case No. CRF-93-5420, if the Oklahoma Court grants Petitioner leave to appeal that case.

The undersigned United States Magistrate Judge RECOMMENDS that Respondents' MOTION TO DISMISS FOR FAILURE TO EXHAUST STATE REMEDIES [Dkt. 5] should be DENIED. Petitioner's MOTION TO CONSOLIDATE [Dkt. 4] should be GRANTED. This case, No. 95-C-225-B, should be consolidated with No. 95-C-308-H in case No. 95-C-308-H. It is further RECOMMENDED that this case be subject in all respects to Judge Holmes Order of May 8, 1996 in Case No. 95-C-308-H.

In accordance with 28 U.S.C. §636(b), Fed. R. Civ. P. 72(b), and Rule 10(b)(3), Rules Governing Section 2254 Cases in the United States District Courts, any objections to this report and recommendation must be filed with the Clerk of the Court within ten (10) days of the receipt of this report. Failure to file objections within the time specified waives the right to appeal from the judgment of the District Court based upon the findings and recommendations of the Magistrate Judge. *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

DATED this 6th day of August, 1996.

Frank H. McCarthy

FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

GLEN ROYAL,

Petitioner,

vs.

RITA MAXWELL, et al.,

Respondent.

No. 96-CV-272-B

ORDER

On May 17, 1996, the Court advised Petitioner this habeas corpus action would be dismissed for failure to pay the filing fee unless Petitioner submitted a properly completed motion for leave to proceed in forma pauperis within fifteen (15) days. Plaintiff has failed to comply.

ACCORDINGLY, IT IS HEREBY ORDERED that Petitioner's motion for leave to proceed in forma pauperis is DENIED and this action is DISMISSED WITHOUT PREJUDICE for failing to pay the filing fee. The Clerk shall MAIL to Petitioner a copy of his petition for a writ of habeas corpus.

SO ORDERED THIS 5 day of Aug, 1996.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

KELLY EUGENE MOSIER,)
)
Plaintiff,)
)
vs.) No. 94-C-1067-B
)
JIM EARP, and FREDDIE HALL,)
)
Defendants.)

ORDER

Before the Court is Defendants' motion to dismiss filed on June 27, 1996. Defendants contend this action should be dismissed due to Plaintiff's refusal to answer questions relating to this law suit during his deposition on June 21, 1995. Plaintiff, a pro se litigant, has not responded.[1]

Plaintiff's failure to respond to Defendants' motion to dismiss constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 7.1.C.[2]

ACCORDINGLY, IT IS HEREBY ORDERED that Defendants' motion to

---

[1]On June 14, 1996, the Court entered an order granting summary judgment in favor of Defendants on Plaintiff's claims concerning access to legal material and a proper diet and denying summary judgment on Plaintiff's claims concerning the ability to exercise, access to medical care and living conditions.

[2]Local Rule 7.1.C reads as follows:

> Response Briefs. Response briefs shall be filed within fifteen (15) days after the filing of the motion. Failure to timely respond will authorize the court, in its discretion, to deem the matter confessed, and enter the relief requested.

dismiss (docket #33) is GRANTED and this action is hereby DISMISSED WITH PREJUDICE.

SO ORDERED THIS 5 day of Aug, 1996.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

RLI INSURANCE COMPANY,

Plaintiff,

vs.

KEN LAMP and DENISE LAMP, d/b/a MID-AMERICA AVIATION; CONNIE R. KING, Individually and as Personal Representative of the Estate of Donald W. King, Deceased; JUANITA FRANKLIN, Individually and as Personal Representative of the Estate of Kenneth W. Franklin, Deceased; PHILIP DAVIS; BARBARA DAVIS; ROSIE SAWYER, Individually and as Personal Representative of the Estate of Bradley Scott Sawyer, Deceased; LONE STAR INDUSTRIES, INC.; and NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA;

Defendants.

Case No. 95-C-467-B

JUDGMENT NUNC PRO TUNC

In accordance with the jury verdict rendered July 24, 1996, Judgment is hereby entered in favor of the Defendants, Ken Lamp and Denise Lamp, d/b/a Mid-America Aviation; Connie R. King, individually and as personal representative of the estate of Donald W. King, deceased; Juanita Franklin, individually and as personal representative of the estate of Kenneth W. Franklin, deceased; Philip Davis; Barbara Davis; Rosie Sawyer, individually and as personal representative of the estate of Bradley Scott Sawyer, deceased; and Lone Star Industries, Inc. and against the Plaintiff, RLI Insurance Company. Costs are assessed against Plaintiff if timely applied for pursuant to Local Rule 54.1.

DATED this 6th day of August, 1996.

s/ THOMAS R. BRETT

THOMAS R. BRETT
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

REMINGTON UNIVERSITY, INC. d/b/a Remington College, Wichita, KS and Remington College, Little Rock, AR,

Plaintiff,

v.

RICHARD W. RILEY, Secretary of the United States Department of Education, in his official capacity,

Defendant.

Case No. 96-C-656-H

ORDER AND REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This order pertains to Plaintiff's Motion to Expedite Discovery (Docket #2). A telephone conference was held on July 29, 1996, and oral arguments were heard.

Plaintiff owns and operates several vocational schools and has filed this action to obtain declaratory relief and preliminary and permanent injunctions against the Secretary of the United States Department of Education. Plaintiff seeks to prohibit publication and use of allegedly unlawfully determined 1991 and 1992 cohort default rates ("CDRs") for current or former students receiving federal student loans from its institutions in Wichita, Kansas and Little Rock, Arkansas and from issuing final 1993 CDR determinations for these institutions. The CDR is, for any fiscal year in which thirty or more current and former students enter repayment on loans received for

attendance at an institution, the percentage of those students who default before the end of the following fiscal year. For any fiscal year in which less than thirty of the institution's current and former students enter repayment, the CDR is the average of the rate calculated under the preceding formula for the three most recent fiscal years. In the case of a student who has attended and borrowed at more than one school, the student's subsequent repayment or default is attributed to each school for attendance at which the student received a loan that entered repayment in the fiscal year. See, 20 U.S.C. § 1085 (m)(1).

Under 20 U.S.C. § 1071 *et seq.*, institutions of higher education with student loan default rates equal to, or in excess of, 25% for the three most recent fiscal years for which data are available will lose their eligibility to participate in Federal Family Education Loan Programs, the Federal Direct Loan Program, and the Federal Pell Grant program. Plaintiff claims that if it is determined to have CDRs over 25% for the three most recent fiscal years, it will effectively lose all of its Title IV eligibility and funding, which provides more than 80% of its revenue, and the reputations of its institutions will be harmed and they will be forced to close.

Plaintiff has gone through the administrative appeals process to challenge defendant's CDR determinations on the basis of erroneous date, inaccurate calculations, improper loan servicing and collection, and mitigating circumstances, but claims that no process exists to allege legal violations by the government, such as breach of contract or violation of due process rights.

Plaintiff raises four contentions in its complaint for declaratory and injunctive

relief. The first is a claim for violation of due process in that the government's CDR appeals process resulted in arbitrary decisions without a fair hearing, which were contrary to government regulations and did not apply the regulatory standard most favorable to plaintiff. The second claim is for violation of Title IV of the Higher Education Act of 1965, 20 U.S.C. § 1085 (m)(1)(C), regarding CDR calculations, in that loans for which the secretary or a guaranty agency had improperly paid reinsurance claims were not excluded in calculations of plaintiff's CDRs.

Plaintiff also contends that defendant breached a settlement agreement between Southern Technical College, the former owner-operator of the schools now owed by plaintiff, and defendant in a bankruptcy case filed in the Eastern District of Arkansas, which excluded loan defaults that fell within its scope from the computation of plaintiff's 1991 and 1992 CDRs.

Finally, plaintiff claims defendant has violated 11 U.S.C. § 525, which prohibits a governmental unit operating a student loan program from denying or refusing to renew a license, permit, charter, or franchise, or denying a grant, loan, or loan guarantee or insurance, to a person who is, or has been, a Title 11 debtor or a person with whom such bankrupt has been associated, solely because the bankrupt has been involved in the bankruptcy. Plaintiff contends that it is associated with Southern Technical College, a Title 11 debtor, and defendant's inclusion in the calculation of plaintiff's CDRs of loans for which prepetition refunds of the colleges were due violated § 525.

Plaintiff claims that, since it has filed a motion for preliminary injunctive relief

and expects a hearing within a short period, expedited discovery through depositions and production of documents is appropriate. It seeks to determine by way of depositions the basis for defendant's CDR appeals determinations, including the treatment of the parties' settlement agreement and prepetition refunds. Since the defendant's pending decision regarding plaintiff's 1993 CDRs threatens its Title IV eligibility and may force the school to close its doors, plaintiff claims it is critical that it immediately collect pertinent information to show constitutional deprivations in this matter and avert closure.

Plaintiff's Motion to Expedite Discovery (Docket #2) is denied. The court directs defendant to pull together the administrative record on an expedited basis. The court advises that the first three causes of action may be determined solely on the administrative record. Discovery is stayed pending a case management conference in the case.

REPORT AND RECOMMENDATION

Discovery in this case will be appropriate if the administrative record reveals that the settlement agreement is ambiguous, and parole evidence is needed to ascertain the meaning of the agreement and the intent of the parties. It will also be appropriate if the administrative record is not clear as to whether the bankruptcy of plaintiff's predecessor served to skew the normal and appropriate administrative process.

The court recommends that this case be set for a case management conference within thirty to sixty days. An early date should be set for the production of the

administrative record to allow the motion for a preliminary injunction to be handled in an expedited manner.

Dated this 5th day of August, 1996.

JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S: remington.ord

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

LOGAN DRILLING COMPANY, INC., et. al.,

Plaintiffs,

v.

RESERVE EXPLORATION COMPANY, et. al.,

Defendants.

Case No. 96-CV-244-H

ORDER OF DISMISSAL UPON SETTLEMENT

The parties to the action, by their counsel, have advised the Court that they have agreed to a settlement.

IT IS HEREBY ORDERED that this matter is DISMISSED WITH PREJUDICE. However, if any party hereto certifies to this Court, with proof of service of a copy thereon on opposing counsel, within ninety days from the date hereof, that settlement has not in fact occurred, the foregoing order shall be vacated and this cause shall forthwith be restored to the calendar for further proceedings.

IT IS SO ORDERED.

This 5TH day of August, 1996.

Sven Erik Holmes
United States District Judge

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UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE 8-7-96

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EDWARD GUY THOMPSON; DEBORAH K. THOMPSON; STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION; SPRINGER CLINIC, INC.; COUNTY TREASURER, Tulsa County, Oklahoma; BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma,

Defendants.

FILED

AUG 6 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Civil Case No. 95-C 739H

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 5TH day of August, 1996. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendant, **State of Oklahoma ex rel. Oklahoma Tax Commission**, appears by Kim D. Ashley, Assistant General Counsel; the Defendant, **Springer Clinic, Inc.** appears by its attorney, Daniel M. Webb; the Defendants, **County Treasurer, Tulsa County, Oklahoma, and Board of County Commissioners, Tulsa County, Oklahoma**, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; the Defendant, and the Defendants, **Edward Guy Thompson** and **Deborah K. Thompson**, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, **Springer Clinic, Inc.**, acknowledged receipt of Summons and Complaint via certified mail on October 4, 1995.

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The Court further finds that the Defendants, **Edward Guy Thompson** and **Deborah K. Thompson**, was served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning January 24, 1996, and continuing through February 28, 1996, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, **Edward Guy Thompson** and **Deborah K. Thompson**, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, **Edward Guy Thompson** and **Deborah K. Thompson**. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Secretary of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is

sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, **County Treasurer, Tulsa County, Oklahoma,** and **Board of County Commissioners, Tulsa County, Oklahoma,** filed their Answers on September 5, 1995; that the Defendant, **Springer Clinic, Inc.,** filed its Answer on October 10, 1995; that the Defendant, **State of Oklahoma ex rel. Oklahoma Tax Commission,** filed its Answer on November 6, 1995; and that the Defendants, **Edward Guy Thompson** and **Deborah K. Thompson,** have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

> **Lot Twenty-seven (27), Block Two (2), CHEROKEE VILLAGE, an Addition to Tulsa County, State of Oklahoma, according to the recorded Plat thereof.**

The Court further finds that on October 31, 1988, the Defendants, **Edward Guy Thompson** and **Deborah K. Thompson,** executed and delivered to Inland Mortgage Corporation, their mortgage note in the amount of $40,274.00, payable in monthly installments, with interest thereon at the rate of 9.5 percent (9.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, **Edward Guy Thompson** and **Deborah K. Thompson,** executed and delivered to Inland Mortgage Corporation, a mortgage dated October 31, 1988,

covering the above-described property. Said mortgage was recorded on November 2, 1988, in Book 5137, Page 2277, in the records of Tulsa County, Oklahoma.

The Court further finds that on October 31, 1988, Inland Mortgage Corporation assigned the above-described mortgage note and mortgage to The Florida Group, Inc. This Assignment of Mortgage was recorded on November 14, 1988, in Book 5139, Page 1856, in the records of Tulsa County, Oklahoma.

The Court further finds that on November 9, 1988, The Florida Group, Inc. assigned the above-described mortgage note and mortgage to Trust America Resources, Inc. This Assignment of Mortgage was recorded on December 12, 1988, in Book 5145, Page 33, in the records of Tulsa County, Oklahoma.

The Court further finds that on November 9, 1988, Trust America Resources, Inc. assigned the above-described mortgage note and mortgage to Government National Mortgage Association. This Assignment of Mortgage was recorded on February 26, 1992, in Book 5383, Page 1193, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 20, 1992, Government National Mortgage Association By: Midfirst Bank State Savings Bank By: its Attorney in Fact assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on February 26, 1992, in Book 5383, Page 1194, in the records of Tulsa County, Oklahoma.

The Court further finds that on January 24, 1992, the Defendants, **Edward Guy Thompson** and **Deborah K. Thompson**, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the

Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on June 19, 1992.

The Court further finds that the Defendants, **Edward Guy Thompson** and **Deborah K. Thompson**, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, **Edward Guy Thompson** and **Deborah K. Thompson**, are indebted to the Plaintiff in the principal sum of $51,765.57, plus interest at the rate of 9.5 percent per annum from August 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount of $318.70 for publication fees.

The Court further finds that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of $25.00 which became a lien on the property as of June 26, 1992; $21.00 which became a lien on June 25, 1993; and $22.00 which became a lien o;n June 23, 1994. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, claims no right, title or interest in the subject real property.

The Court further finds that the Defendant, **Springer Clinic, Inc.**, claims an interest in the subject real property by virtue of a judgment filed of record on March 23, 1995 in the amount of $10,520.73, the current balance due.

The Court further finds that the Defendant, **State of Oklahoma ex rel. Oklahoma Tax Commission**, claims an interest in the subject real property by virtue of Tax Warrant No. ITI9500051300 filed of record on January 12, 1995 in the amount of $331.91 plus penalties and interest according to law.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment against the Defendants, **Edward Guy Thompson** and **Deborah K. Thompson**, in the principal sum of $51,765.57, plus interest at the rate of 9.5 percent per annum from August 1, 1994 until judgment, plus interest thereafter at the current legal rate of 5.81 percent per annum until paid, plus the costs of this action in the amount of $318.70 for publication fees, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **County Treasurer, Tulsa County, Oklahoma**, have and recover judgment in the amount of $25.00 for personal property taxes for the year 1991; $21.00 for the year 1992; and $22.00 for the year 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **Springer Clinic, Inc.**, have and recover judgment in the amount of $10,520.73.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **State of Oklahoma ex rel. Oklahoma Tax Commission**, have and recover judgment in the amount of $331.91 plus penalties and interest.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, **Board of County Commissioners, Tulsa County, Oklahoma**, claims no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, **Edward Guy Thompson** and **Deborah K. Thompson**, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisement the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, **County Treasurer, Tulsa County, Oklahoma**, in the amount of $25.00 for personal property taxes for the year 1991; $21.00 for the year 1992; and $22.00

for the year 1993, personal property taxes which are currently due and owing;

Fourth:

In payment of Defendant, **State of Oklahoma ex rel. Oklahoma Tax Commission,** have and recover judgment in the amount of $331.91 plus penalties and interest;

Fifth:

In payment of Defendant, **Springer Clinic, Inc.,** have and recover judgment in the amount of $10,520.73.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

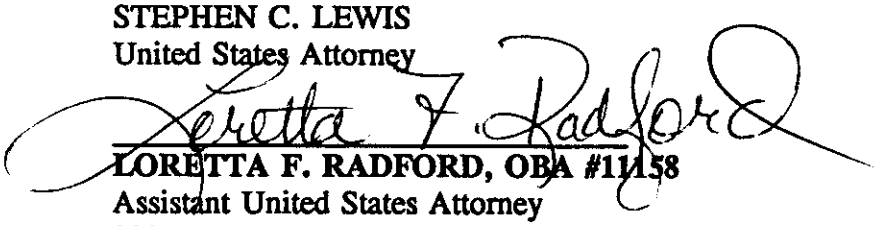
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



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Judgment of Foreclosure
Civil Action No. 95-C 739H
USA v. Edward Guy Thompson, et al.
LFR/esf

APPROVED:

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Judgment of Foreclosure
Civil Action No. 95-C 739H
USA v. Edward Guy Thompson, et al.
LFR/esf
A-95-704, CIV 95-739 H
NDOkla

APPROVED:

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Judgment of Foreclosure
Civil Action No. 95-C 739H
USA v. Edward Guy Thompson, et al.
LFR/esf

IN THE UNITED STATES COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOE ROBERTSON, AND)
)
JERRY TROXELL,)
)
Plaintiffs,)
)
vs.) Case No. 95 C 1226H
)
PROFESSIONAL CREDIT RECOVERY,)
INC., an OKLAHOMA CORPORATION,)
JANE PHILLIPS EPISCOPAL HOSPITAL)
INC., an OKLAHOMA CORPORATION,)
LARRY MINDEN AND JANIE MIZE,)
)
Defendants.)

ORDER

Upon the Parties Joint Stipulation for Dismissal With Prejudice and for good cause shown,

IT IS HEREBY ORDERED that the above captioned matter is dismissed with prejudice, each side to bear his, her or its own costs, expenses and attorneys' fees.

DATED: August 5, 1996

United States Judge

Submitted by:

David E. Strecker, OBA No. 8687
Connie Lee Kirkland, OBA No. 14262
Strecker & Kirkland, P.C.
Petroleum Club Building
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(918) 582-1716

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JAMES JOUBERT,)
)
Plaintiff,)
)
vs.) No. 96-CV-467-H
)
UNITED STATES OF AMERICA, et al.,)
)
Defendants.)

ORDER

Plaintiff, a pro se inmate, has filed a motion for leave to proceed in forma pauperis and a civil rights complaint against the United States of America and the Drug Enforcement Agency. Plaintiff alleges that on August 22, 1990, he was sentenced to 210 months imprisonment for conspiring to possess and distribute cocaine-base and that shortly thereafter his property located at 4801 North Trenton Avenue was forfeited to the United States Government on the basis of the same criminal conduct. Plaintiff contends that the Double Jeopardy Clause prohibits the Government from punishing a defendant for a criminal offense and forfeiting his property for that same offense in a separate civil proceeding. Plaintiff requests a declaratory judgment, the return of his property, and actual and punitive damages.

On June 24, 1996, the Court granted Plaintiff leave to proceed in forma pauperis. The Prison Litigation Reform Act of 1996, added a new section to the in forma pauperis statute, entitled "Screening." See 28 U.S.C. § 1915A. That section requires the Court to review prisoner complaints before docketing, or as soon as

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practicable after docketing, and "dismiss the complaint, or any portion of the complaint, if the complaint . . . is frivolous, malicious, or fails to state a claim upon which relief may be granted. Id. "The term 'frivolous' refers to 'the inarguable legal conclusion' and 'the fanciful factual allegation.'" Hall v. Bellmon, 935 F.2d 1106, 1108 (10th Cir. 1991) (quoting Neitzke v. Williams, 490 U.S. 319, 325, 327 (1989)). If a plaintiff states an arguable claim for relief, even if not ultimately correct, dismissal for frivolousness is improper. Id. at 1109. Inarguable legal conclusions include those against defendants undeniably immune from suit or those alleging infringement of a legal interest which clearly does not exist. Id. A plausible factual allegation which lacks evidentiary support, even though it may not ultimately survive a motion for summary judgment, is not frivolous within the meaning of section 1915(d). Id.

After liberally construing Plaintiff's pro se pleading, see Hall, 935 F.2d at 1100, the Court concludes that Plaintiff's complaint lacks an arguable basis in law. Plaintiff alleges infringement of a legal interest which clearly does not exist. The Supreme Court recently held that civil in rem forfeitures, like the one at issue in this case, are not "punishment" for purposes of the Double Jeopardy Clause. United States v. Ursery, ___ S.Ct. ___, 64 U.S.L.W. 4565, 1996 WL 340815 (June 24, 1996). Therefore, Plaintiff was not twice placed in jeopardy for the same offense.

ACCORDINGLY, IT IS HEREBY ORDERED that this action is DISMISSED as frivolous pursuant to 28 U.S.C. § 1915(e). The Clerk

shall MAIL a copy of the complaint to Plaintiff.

IT IS SO ORDERED this 5TH day of August, 1996.

SVEN ERIK HOLMES
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CHRIS GORTEMILLER,

Plaintiff,

v.

JOSEPH LAPAN, Attorney at Law,

Defendant.

Case No. 96-CV-673-H

ORDER

Plaintiff, a pro se inmate at Oklahoma State Penitentiary in McAlester, has filed a motion for leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915, and a pro-se civil rights complaint pursuant to 42 U.S.C. § 1983. He alleges that Joseph Lapan, attorney at law, is providing "ineffective assistance of counsel" in connection with divorce proceedings in Tulsa County District Court. He contends that Mr. Lapan withdrew as attorney of record on June 22, 1995, after violating numerous Oklahoma Rules of Professional Conduct. Plaintiff seeks $3,980,000 in damages.

The Prison Litigation Reform Act of 1996, added a new section to the in forma pauperis statute, entitled "Screening." See 28 U.S.C. § 1915A. That section requires the Court to review prisoner complaints before docketing, or as soon as practicable after docketing, and "dismiss the complaint, or any portion of the complaint, if the complaint . . . is frivolous, malicious, or fails to state a claim upon which relief may be granted. Id. A suit is frivolous if "it lacks an arguable basis in either law or fact." Neitzke v. Williams, 490 U.S. 319, 325 (1989); Olson v. Hart, 965 F.2d 940, 942 n.3 (10th Cir. 1992). A suit is legally frivolous if

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it is based on "an indisputably meritless legal theory." Denton v. Hernandez, 112 S. Ct. 1728, 1733 (1992) (quoting Neitzke, 490 U.S. at 327). A suit is factually frivolous, on the other hand, if "the factual contentions are clearly baseless." Id.

After construing Plaintiff's pro se pleading liberally, see Hall v. Bellmon, 935 F.2d 1106, 1100 (10th Cir. 1991), the Court concludes that Plaintiff's action lacks an arguable basis in law and should be dismissed sua sponte as frivolous. While Plaintiff may be able to state a malpractice claim under Oklahoma law against Mr. Lapan, that claim does not constitute a federal case.[1] See Lemmons v. Law Firm of Morris and Morris, 39 F.3d 264, 266 (10th Cir. 1994); see also Bilal v. Kaplan, 904 F.2d 14, 15 (8th Cir. 1990) (per curiam); Brown v. Schiff, 614 F.2d 237, 239 (10th Cir.) (per curiam), cert. denied, 446 U.S. 941 (1980). "The conduct of counsel, either retained or appointed, in representing clients, does not constitute action under color of state law for purposes of a section 1983 violation." Bilal, 904 F.2d at 15; see also Lemmons, 39 F.3d at 266. Cf., Tower v. Glover, 467 U.S. 914, 920 (1984) (citing Polk County v. Dodson, 454 U.S. 312, 325 (1981)) (public defender does not act under color of state law when representing an indigent defendant in a state criminal proceeding). Moreover, Plaintiff has not alleged any grounds for the exercise of diversity jurisdiction in this case. See Lemmons, 39 F.3d at 266.

Accordingly, as this case lacks an arguable basis in law, it

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[1] This comment should not be construed as this court is in any way indicating such claim has merit.

is hereby DISMISSED as frivolous under section 1915(e). Plaintiff's motion to proceed in forma pauperis is GRANTED. The Clerk shall MAIL a copy of the complaint to Plaintiff.

SO ORDERED THIS 5TH day of AUGUST, 1996.

SVEN ERIK HOLMES
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

DONNOWON L. BURNETT, SR.,

Plaintiff,

vs.

MICHAEL O'DELL, et al.,

Defendants.

No. 96-C-377-H

ORDER

On May 3, 1996, Plaintiff filed this civil rights action along with a motion for leave to proceed in forma pauperis. The Court now reviews Plaintiff's complaint and concludes that this action should be dismissed sua sponte as frivolous.

In his pro se complaint, Plaintiff sues Michael O'Dell, a cashier at a Stax store, and Tulsa Police Officers Dave Davis, M. O'Brien, J. Vandiver, J. Cleary, and Stephen St. Clair for false arrest and malicious prosecution. He contends he was arrested for the robbery of a Stax store on July 28, 1995, although he does not fit the description of the suspect. Plaintiff seeks money damages.[1]

The Prison Litigation Reform Act of 1996, added a new section to the in forma pauperis statute, entitled "Screening." See 28

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[1] The Court will not address in this action Plaintiff's contention that his public defender, who is not named in the complaint, is providing ineffective assistance of counsel.

Plaintiff does not allege his arrest was warrantless in addition to being unlawful. Therefore, the Court construes Plaintiff's claim to resemble the common law tort of malicious prosecution. See Calero-Colon v. Betancourt-Lebron, 68 F.3d 1, 4 (1st Cir. 1995).

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U.S.C. § 1915A. That section requires the Court to review prisoner complaints before docketing, or as soon as practicable after docketing, and "dismiss the complaint, or any portion of the complaint, if the complaint . . . is frivolous, malicious, or fails to state a claim upon which relief may be granted. Id. See also 28 U.S.C. § 1915(e). "The term 'frivolous' refers to 'the inarguable legal conclusion' and 'the fanciful factual allegation.'" Hall v. Bellmon, 935 F.2d 1106, 1108 (10th Cir. 1991) (quoting Neitzke v. Williams, 490 U.S. 319, 325, 327 (1989)). If a plaintiff states an arguable claim for relief, even if not ultimately correct, dismissal for frivolousness is improper. Id. at 1109. Inarguable legal conclusions include those against defendants undeniably immune from suit or those alleging infringement of a legal interest which clearly does not exist. Id. A plausible factual allegation which lacks evidentiary support, even though it may not ultimately survive a motion for summary judgment, is not frivolous within the meaning of section 1915(e). Id.

After liberally construing Plaintiff's pro se pleadings, see Haines v. Kerner, 404 U.S. 519, 520-21 (1972); Hall v. Bellmon, 935 F.2d 1106, 1100 (10th Cir. 1991), the Court concludes that this action should be dismissed as it lacks an arguable basis in law. Plaintiff cannot seek money damages for the alleged invalidity of the charges pending against him in Tulsa County prior to a determination that the charges are invalid. The Supreme Court recently held in Heck v Humphrey, 114 S.Ct. 2364, 2372 (1994), that in order to recover damages in an action brought pursuant to 42

U.S.C. § 1983 for an allegedly unconstitutional conviction or imprisonment, or for "other harm caused by actions whose unlawfulness would render a conviction or sentence invalid," a prisoner must show that the conviction or sentence has been "reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." Because the validity of Plaintiff's imprisonment has yet to be undermined, the Court must dismiss this action as premature.

ACCORDINGLY, IT IS HEREBY ORDERED that Plaintiff's motion for leave to proceed in forma pauperis is **granted** and this action is hereby **dismissed without prejudice** pursuant to 28 U.S.C. § 1915(e).

IT IS SO ORDERED this 5TH day of August, 1996.

SVEN ERIK HOLMES
UNITED STATES DISTRICT JUDGE

CHARLES L. BOYD,

Plaintiff,

v.

DAMON CANTRELL, Assistant Public Defender,

Defendant.

Case No. 96-CV-647-H

ORDER

Plaintiff, a pro se inmate at the Tulsa County Jail, has filed a motion for leave to proceed in forma pauperis pursuant to 28 U.S.C. § 1915, and a pro-se civil rights complaint pursuant to 42 U.S.C. § 1983. He alleges that Damon Cantrell, his appointed public defender, is providing ineffective assistance of counsel in connection with felony charges presently pending against him in Tulsa County District Court. He alleges that Mr. Cantrell has not acted in Plaintiff's best interest, often lies, and has shown prejudice, incompetence, and conflict of interest. Plaintiff further alleges that Mr. Cantrell refuses to come to the Tulsa County Jail to discuss his defense. Plaintiff requests this Court to direct his release from custody and the right to plead guilty to Culpable Negligence instead of Sexual Battery.

The Prison Litigation Reform Act of 1996, added a new section to the in forma pauperis statute, entitled "Screening." See 28 U.S.C. § 1915A. That section requires the Court to review prisoner complaints before docketing, or as soon as practicable after docketing, and "dismiss the complaint, or any portion of the

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complaint, if the complaint . . . is frivolous, malicious, or fails to state a claim upon which relief may be granted. Id. A suit is frivolous if "it lacks an arguable basis in either law or fact." Neitzke v. Williams, 490 U.S. 319, 325 (1989); Olson v. Hart, 965 F.2d 940, 942 n.3 (10th Cir. 1992). A suit is legally frivolous if it is based on "an indisputably meritless legal theory." Denton v. Hernandez, 112 S. Ct. 1728, 1733 (1992) (quoting Neitzke, 490 U.S. at 327). A suit is factually frivolous, on the other hand, if "the factual contentions are clearly baseless." Id.

After construing Plaintiff's pro se pleading liberally, see Hall v. Bellmon, 935 F.2d 1106, 1100 (10th Cir. 1991), the Court concludes that Plaintiff's action lacks an arguable basis in law and should be dismissed sua sponte as frivolous. While Plaintiff may be able to state a malpractice claim under Oklahoma law against Mr. Cantrell that claim does not constitute a federal case.[1] See Lemmons v. Law Firm of Morris and Morris, 39 F.3d 264, 266 (10th Cir. 1994); see also Bilal v. Kaplan, 904 F.2d 14, 15 (8th Cir. 1990) (per curiam); Brown v. Schiff, 614 F.2d 237, 239 (10th Cir.) (per curiam), cert. denied, 446 U.S. 941 (1980). "The conduct of counsel, either retained or appointed, in representing clients, does not constitute action under color of state law for purposes of a section 1983 violation." Bilal, 904 F.2d at 15; see also Lemmons, 39 F.3d at 266. Cf., Tower v. Glover, 467 U.S. 914, 920 (1984) (citing Polk County v. Dodson, 454 U.S. 312, 325 (1981))

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[1] This comment should not be construed as this court is in any way indicating such claim has merit.

(public defender does not act under color of state law when representing an indigent defendant in a state criminal proceeding). Moreover, Plaintiff has not alleged any grounds for the exercise of diversity jurisdiction in this case. See Lemmons, 39 F.3d at 266.

Accordingly, as this case lacks an arguable basis in law, it is hereby DISMISSED as frivolous under section 1915(e). Plaintiff's motion to proceed in forma pauperis is GRANTED. The Clerk shall MAIL a copy of the complaint to Plaintiff.

SO ORDERED THIS 5TH day of August, 1996.

SVEN ERIK HOLMES
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TONYA CARRIGER,

Plaintiff,

vs.

MAYES COUNTY JAIL, HAROLD BERRY, GEORGE KLATTS, and the MAYES COUNTY COMMISSIONERS,

Defendants.

No. 96-CV-534-H

ORDER

On June 12, 1996, Plaintiff filed a civil rights complaint against the Mayes County Jail, Sheriff Harold Berry, and the Mayes County Commissioners, complaining about the conditions of confinement at the Mayes County Jail. On June 20, 1996, the Clerk's Office notified Plaintiff that his complaint was unsigned and that he needed to submit a motion for leave to proceed in forma pauperis. Plaintiff has failed to respond or notify the Court that he has been transferred.

ACCORDINGLY, IT IS HEREBY ORDERED that this action is DISMISSED WITHOUT PREJUDICE for lack of prosecution.

SO ORDERED THIS 5TH day of August, 1996.

SVEN ERIK HOLMES
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

PAULA COOK,

Plaintiff,

v.

BANK OF OKLAHOMA, N.A., a corporation,

Defendant.

Case No. 95-C-1010-H

ORDER

UPON the Joint Stipulation for Dismissal with Prejudice filed by Plaintiff and Defendant, it is hereby

ORDERED, that Plaintiff's Complaint, and all claims asserted or which could have been asserted therein, are hereby DISMISSED, with prejudice to refiling, each party to bear its respective costs and attorney fees.

DONE this 5TH day of August, 1996.

UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
AUG - 5 1996
Phil Lombardi, Clerk
U.S. DISTRICT COURT

BARBARA WADE,

Plaintiff,

v.

THOMPSON MEDICAL COMPANY, INC., a foreign corporation,

Defendant.

Case No. 95-CV-972-B

ENTERED ON DOCKET
DATE 8-6-96

ORDER GRANTING JOINT STIPULATION AND APPLICATION FOR AN ORDER OF DISMISSAL WITH PREJUDICE

For good cause having been shown, the parties, Plaintiff, Barbara Wade, and Defendant, Thompson Medical Company, Inc., by and through their attorneys of record, having stipulated to the entry by this Court of an order of dismissal with prejudice of any and all claims which have been asserted, or which might have been asserted, as a result of the matters described in the Plaintiff's Complaint, it is hereby ordered that the above-captioned action be dismissed with prejudice.

DATED this 5 day of Aug, 1996.

UNITED STATES DISTRICT COURT JUDGE

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

EUGENE EMIL SNIDER,

Plaintiff,

vs.

TULSA COUNTY, SHERIFF STANLEY GLANZ, COUNTY COMMISSIONER BOB DICK,

Defendants.

No. 96-CV-754-BU

ORDER

Plaintiff, a detainee at the Tulsa County Jail, has filed a motion for leave to proceed in forma pauperis and a civil rights complaint against Sheriff Stanley Glanz and County Commissioner Bob Dick. The Certificate on the third page of the in forma pauperis motion reveals that as of August 16, 1996, Plaintiff was no longer in custody of the Tulsa County Jail.

Plaintiff contends Defendants failed to provide adequate medical care for his acute depression. He alleges that a nurse forced him to stay in a cell naked for twenty-four hours before giving him a paper skirt. This treatment caused Plaintiff to get "so upset that [he] pulled a good portion of [his] hair out." Plaintiff further alleges that he was cold and felt humiliated when visitors were brought through the area where he was being detained. Lastly, Plaintiff alleges that the mattresses at the Tulsa County Jail are too short, that the medication provided was insufficient for his medical problems, and that Defendants forced him to carry things that were over the weight limit prescribed by his doctor.

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Plaintiff requests medical attention, adequate bedding and damages in excess of $10,000.

The Prison Litigation Reform Act of 1996 (the Act), Pub.L. No. 104-134, § 805, 110 Stat. 1321 (April 26, 1996) added a new section to the in forma pauperis statute entitled "Screening." Id. (to be codified at 28 U.S.C. § 1915A). That section requires the Court to review a complaint brought by a prisoner seeking redress from a governmental entity or officer to determine if the complaint is frivolous, malicious, or fails to state a claim upon which relief may be granted. In addition, the Act provides that a district court may dismiss an action filed in forma pauperis "at any time" if the court determines that the action is frivolous, malicious, or fails to state a claim upon which relief may be granted. See id. § 804(a)(5) (amending 28 U.S.C. § 1915(d)) (to be codified at 28 U.S.C. § 1915(e)(2)(B)).

"The term 'frivolous' refers to 'the inarguable legal conclusion' and 'the fanciful factual allegation.'" Hall v. Bellmon, 935 F.2d 1106, 1108 (10th Cir. 1991) (quoting Neitzke v. Williams, 490 U.S. 319, 325, 327 (1989)). If a plaintiff states an arguable claim for relief, even if not ultimately correct, dismissal for frivolousness is improper. Id. at 1109. Inarguable legal conclusions include those against defendants undeniably immune from suit or those alleging infringement of a legal interest which clearly does not exist. Id. A plausible factual allegation which lacks evidentiary support, even though it may not ultimately survive a motion for summary judgment, is not frivolous within the

meaning of section 1915(e)(2)(B). Id.

After liberally construing Plaintiff's pro se pleadings, see Haines v. Kerner, 404 U.S. 519, 520-21 (1972); Hall v. Bellmon, 935 F.2d 1106, 1100 (10th Cir. 1991), the Court concludes that Plaintiff's allegations lack an arguable basis in law. The Eighth Amendment prohibits prison officials from being deliberately indifferent to the serious medical needs of prisoners in their custody. Estelle v. Gamble, 429 U.S. 97, 104 (1976). Under the Fourteenth Amendment Due Process Clause, pretrial detainees are entitled to the same degree of protection regarding medical care as that afforded convicted inmates under the Eighth Amendment. Martin v. Board of County Com'rs of County of Pueblo, 909 F.2d 402, 406 (10th Cir. 1990).

Plaintiff's allegations amount at the most to a disagreement of opinion as to how Defendants should have treated his acute depression during his detention at the Tulsa County Jail. The Tenth Circuit and the U.S. Supreme Court have traditionally held that "such a difference of opinion does not support a claim of cruel and unusual punishment." Olson v. Stotts, 9 F.3d 1475, 1477 (citations omitted). See also Estelle, 429 U.S. at 107 (a prisoner's disagreement with the diagnostic techniques or forms of treatment utilized by prison medical personnel does not give rise to a cognizable Eighth Amendment claim); Wilson v. Seiter, 501 U.S. 294 (1991).

Plaintiff's claims that Defendants were negligent do not raise a claim cognizable under section 1983. West v. Atkins, 487 U.S.

42, 48 (1988) (only the violation of a right secured by the Constitution or laws of the United States is actionable under 42 U.S.C. § 1983). Neither negligence nor gross negligence meets the deliberate indifference standard required for a violation of the cruel and unusual punishment clause of the Eighth Amendment. Estelle, 429 U.S. at 104-05; Ramos v. Lamm, 639 F.2d 559, 575 (10th Cir. 1980), cert. denied, 450 U.S. 1041 (1981).

In any event, the Court notes Plaintiff has failed to allege whether Sheriff Stanley Glanz was personally involved in the facts at issue in this case. It is well established principle that a defendant may not be held liable under section 1983 unless the defendant caused or participated in the alleged constitutional deprivation. Housley v. Dodson, 41 F.3d 597, 600 (10th Cir. 1994). Mere supervisory status, without more, will not create liability in a section 1983 action. Ruark v. Solano, 928 F.2d 947, 950 (10th Cir. 1991); Meade v. Grubbs, 841 F.2d 1512, 1527-28 (10th Cir. 1988).[1]

Moreover, Tulsa County Commissioner Bob Dick cannot be held liable for the incidents alleged in the instant complaint. "Under Oklahoma law, the Board [of County Commissioners] has no statutory

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[1] To state a claim against a supervisor, a plaintiff must allege facts which demonstrate the supervisor's personal involvement in the unconstitutional activities of his subordinates. For instance, a supervisor may be found liable (1) if after learning of the constitutional deprivation through a report or appeal, the supervisor failed to remedy the wrong; (2) if the supervisor created a policy or custom under which unconstitutional practices occurred, or allowed such a policy or custom to continue; or (3) if the supervisor was grossly negligent in managing the subordinates who caused the unlawful condition or event. See Williams v. Smith, 781 F.2d 319, 323-24 (2d Cir. 1986).

duty to hire train, supervise or discipline the county sheriffs or their deputies." Meade, 841 F.2d 1512, 1528. Therefore, unless Bob Dick voluntarily undertook responsibility for hiring or supervising county law enforcement officers, which is not alleged, he was not "affirmatively linked" with the alleged failure to protect. Id.

Lastly, the Prison Litigation Reform Act of 1996 limits the filing of civil actions by prisoners for mental or emotional injury suffered while in custody without a prior showing of physical injury. Pub. L. No. 104-134, 110 Stat. 1321, section 803. Plaintiff has not alleged a physical injury as a result of the suicide watch and alleged denial of medical care.

Accordingly, Plaintiff's motion for leave to proceed in forma pauperis is GRANTED and this action is hereby DISMISSED without prejudice as it lacks an arguable basis in law. The Clerk shall MAIL a copy of the complaint to Plaintiff at 1624 N. Yorktown Pl, Tulsa, OK 74110.

IT IS SO ORDERED this 5th day of September, 1996.

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JACKIE HOWARD PARRET,)
)
PETITIONER,)
)
vs.) CASE NO. 94-C-221-H
)
BOBBY BOONE,)
)
RESPONDENT.)

REPORT AND RECOMMENDATION OF U.S. MAGISTRATE JUDGE

Petitioner's PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. §2254 BY A PERSON IN STATE CUSTODY [Dkt. 1] and Petitioner's MOTION FOR JUDGMENT ON THE PLEADINGS [Dkt. 23] are before the undersigned United States Magistrate Judge for report and recommendation. Respondent represents that Petitioner has exhausted his state court remedies for purposes of federal habeas corpus review. [Dkt. 18]. Both parties represent that there is no necessity for an evidentiary hearing in this case. [Dkt. 18, 23]. The Court concurs and therefore proceeds to make its recommendation for disposition of the petition based upon the briefs.

Petitioner challenges his conviction in Tulsa County District Court, Case No. CRF-86-2774, for burglary of an automobile after former conviction of two or more felonies. Petitioner makes no assertion of innocence, but raises the following claims: (1) that the State used invalid convictions to enhance his sentence; (2) that the State used prior convictions that arose from the same transaction for enhancement purposes; and (3) that the trial judge failed to ensure that Petitioner's waiver of counsel and waiver of appeal were knowingly and intelligently made. Petitioner's

third claim concerning his waiver of counsel and appeal have been dismissed as successive and abusive by Order of the Court [Dkt. 15] adopting the report and recommendation of the U.S. Magistrate Judge filed on October 21, 1994 [Dkt. 11]. Accordingly, this report addresses only the issues concerning enhancement of Petitioner's sentence.

In Tulsa County District Court, Case No. CRF-86-2774, Petitioner was found guilty of burglary of an automobile. The trial transcript reflects that in the punishment stage of the bifurcated trial, the amended information was read to the jury which informed that Petitioner had four previous felony convictions in Kansas. The evidence presented to the jury in the form of docket sheets and journal entries from the Kansas cases reflect that Petitioner had previously been convicted of four felonies and one misdemeanor, although some of the offenses for which he was convicted differed somewhat from those listed on the amended information. The sentence applicable to the instant offense was increased under 21 O.S. §51(B) which provides:

> B. Every person who, having been twice convicted of felony offenses, commits a third, or thereafter, felony offenses within ten (10) years of the date following the completion of the execution of the sentence, shall be punished by imprisonment in the State Penitentiary for a term of not less than twenty (20) years. Felony offenses relied upon shall not have arisen out of the same transaction or occurrence or series of events closely related in time and location. Nothing in this section shall abrogate or affect the punishment by death in all crimes now or hereafter made punishable by death.

At trial the prosecutor read the following contents of the information to the jury concerning the Petitioner's previous convictions:

> The State of Oklahoma, Plaintiff, versus Jackie Howard Parret, the Defendant, CRF-86-2774. The State further alleges that the said Jackie Howard Parret was heretofore on the 22nd day of March, 1983 in case no. 83-CR-146, in the District Court of Montgomery County, State of Kansas, said court being one of competent jurisdiction, convicted of an offense to-wit: the crime of Theft, Class D, which offense if committed in this State would be punishable by the laws of this State by imprisonment in the penitentiary. Said Defendant being represented by counsel at the time, and said conviction being a final judgment in the case.
>
> That the said Jackie Howard Parret was heretofore on the 1st day of February, 1984, in Case No. 83-CR-98, in the District Court of Rice County, State of Kansas, said court being one of competent jurisdiction, convicted of an offense to-wit: the crime of Burglary, Class D, which offense if committed within this State would be punishable by the laws of this State by imprisonment in the penitentiary. Said Defendant being represented by counsel at the time, and said conviction being a final judgment in the case.
>
> That the said Jackie Howard Parret was heretofore on the 20th day of June, 1983, in Case No. 83-CR-20, in the District Court of Harper County, State of Kansas, said court being one of competent jurisdiction, convicted of an offense to-wit: the crime of Burglary, Class D-Count I, which offense if committed within this State would be punishable by the laws of this State by imprisonment in the penitentiary. Said Defendant being represented by counsel at the time, and said conviction being a final judgment in the case.
>
> That the said Jackie Howard Parret was heretofore on the 20th day of June, 1983, in Case No. 83-CR-20, in the District Court of Harper County, State of Kansas, said court being one of competent jurisdiction, convicted of an offense to wit: the crime of Attempted Burglary, Class D-Count II, which offense if committed within this State would be punishable by the laws of this State by imprisonment in the penitentiary. Said Defendant being represented by counsel at the time, and said conviction being a final judgment in the case, contrary to the form of the statutes in such cases made and provided, and against the peace and

dignity of the State, signed by David Moss, District Attorney, and Ray Hasselman.

Transcript of Jury Trial, Pages 104 through 106.

Petitioner claims that the convictions used to enhance his sentence were invalid. Actually, the substance of Petitioner's argument is not that the convictions themselves were invalid but that he was not convicted on some of the Kansas charges that were set forth in the Amended Information.[1] In support of the argument that his sentence was improperly enhanced, Petitioner presented copies of journal entries from Kansas courts which reflect that some of the Kansas charges against him were dismissed at sentencing. The Court ordered production of certified copies of the exhibits introduced by the State in the sentencing stage of Petitioner's Tulsa County trial. [Dkt. 26].

The exhibits introduced by the State of Oklahoma in the sentencing stage of Petitioner's trial consist of: the docket sheet and journal entry in Montgomery County, Kansas Case No. 83-CR-146-I wherein Petitioner was sentenced for felony theft (State's Exhibit 3); Petitioner's motion to modify sentence and order modifying sentence in Rice County, Kansas Case No. 83-CR-98 wherein the felony sentence was modified downward from a maximum of ten years to "a period of not less than three (3) nor more than seven (7) years" (State's Exhibit 4); journal entry and docket

[1] Amended Information attached as Exhibit B-2 to Petitioner's Motion to Expand the Record, filed October 12, 1994, Dkt. 10.

sheet in Harper County, Kansas Case No. 83-CR-20 wherein Petitioner was sentenced for burglary and attempted burglary (State's Exhibit 5). [Dkt. 27].

The Court finds that there is no factual basis to support Petitioner's claim that an "invalid" Harper County conviction was used to enhance his sentence. In the Harper County case, (No. 83-CR-20) Petitioner was sentenced for burglary and attempted burglary. Apparently, the charge of "feloniously and willfully obtain or exert unauthorized control over property, Class E-Count III" was dismissed at sentencing. Based on this Court's review of the transcript and the State's exhibits, the Court concludes that the dismissed charge was not presented to the jury in any manner. It was not read to the jury in the Amended Information, nor was it included in the evidence submitted to the jury for its consideration in sentencing Petitioner.

Petitioner asserts that the State relied upon felony offenses that arose from the same transaction for enhancement purposes in violation of 21 O.S. §51(B). According to Petitioner, "the State used Rice County of Burglary (which was and is invalid . . .) and felony theft where theft charge was a direct result of burglary." [Dkt. 1, Petition §(16)(B)(2)]. There is no factual support for this allegation of error.

The Amended Information was inaccurate insofar as it stated Petitioner had been convicted of burgulary in Rice County. The burglary charge was dismissed and Petitioner pled guilty to felony theft. However, the Information contained only one Rice County felony conviction. The State's evidence related to the Rice County conviction consisted of Petitioner's motion to modify sentence to comport with his plea bargain and the order modifying the sentence. [Dkt. 27, State's Exhibit 4]. The

State's evidence reflects that Petitioner plead nolo contendre to a single felony count but does not reflect the precise offense. Based on a review of the trial transcript and the State's exhibits, the Court finds that the State of Oklahoma did not rely on *two* Rice County convictions for enhancement of Petitioner's sentence. The State proved Petitioner was convicted of one felony in Rice County.

Petitioner's allegations concerning the improper enhancement of his sentence relate to only one of four convictions actually published to the jury. Petitioner does not contest the validity of three felony convictions in evidence: Case No. 83-CR-146, Theft (Montgomery County); Case No. 83-CR-20, Burglary (Harper County); Case No. 83-CR-20, Attempted Burglary (Harper County). Nor does he claim that these convictions arose from the same transaction. The rule that reliance on an invalid conviction is harmless where enhancement could have been based on other convictions applies here. See *Webster v. Estelle,* 505 F.2d 926, 931 (5th Cir. 1974).[2] The Oklahoma statute under which Petitioner's sentence was enhanced, 21 O.S. §51(B) requires two prior felony convictions. Assuming, *arguendo*, that the Rice County conviction was invalid, there are three remaining convictions upon which enhancement could have been based. Therefore, the statutory two conviction requirement for enhancement was clearly met in this case.

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[2] *In a recent unpublished opinion, Porter v. Fields, No. 94-6437; 53 F.3rd 342 (Table), 1995 WL 261105 (10th Cir. (Okl.) May 4, 1995) the 10th Circuit relied on Webster in affirming a sentence enhancement.*

Petitioner has cited *Tiffey v. State*, 476 P.2d 84 (Okl.Cr. 1970); *Holmes v. State*, 664 P.2d 1063 (Okl.Cr. 1983); *Coleman v. State*, 760 P.2d 196 (Okl.Cr. 1988) arguing that the Oklahoma Court of Criminal Appeals has held that the use of invalid former convictions affects substantial rights such that the sentence should be modified to the least sentence appropriate under the circumstances. The cases cited by Petitioner are inapposite. The *Tiffey* and *Holmes* cases deal with the situation where it could not be ascertained whether the defendant had effectively waived counsel in connection with the prior conviction. The rationale for sentence modification in such cases is based on the defendant's constitutionally guaranteed right to assistance of counsel. If denied that right, it is reversible error to compound that wrong by later using that same conviction to enhance punishment on a later charge. *Burgett v. Texas*, 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967). Petitioner raises no issue regarding counsel in the Kansas convictions. Furthermore, the materials submitted to this Court reflect that he was represented by counsel in all three Kansas cases.

Coleman, supra., is also inapplicable to the present case. *Coleman* addresses the impropriety of using multiple convictions stemming from the same crime episode for enhancement purposes. As previously discussed, there is no factual support for Petitioners claim that the state relied on two Rice County felony convictions arising from the same transaction. The trial record demonstrates that only <u>one</u> felony conviction from Rice County was introduced into evidence. None of the cases relied

upon by Petitioner support his request for relief under the circumstances presented in this case.

Petitioner's Supplemental Brief [Dkt. 30] filed April 24, 1996, raises several additional objections. Petitioner states: (1) he never saw State's Exhibits 3, 4, and 5 at the time of trial; (2) the Kansas docket sheet presented in State's Exhibits 3 and 5 improperly influenced the jury into believing there was a trial in those cases instead of a plea bargain; and (3) the journal entry from Harper County (State's Exhibit 5) reflected that he was convicted of misdemeanor possession of methquolone which prejudiced the jury. These contentions relate to the conduct of the trial, not to the question of sentence enhancement as such they do not fall within the narrow parameters upon which this petition escaped dismissal as successive and abusive. Therefore the new matters raised in Petitioner's Supplemental Brief are not addressed.

The Court finds that there are three felony convictions to which no objections are posed upon which sentence enhancement may have been based under 21 O.S. §51(B). Accordingly, the undersigned United States Magistrate Judge RECOMMENDS that the instant Petition for Writ of Habeas Corpus [Dkt. 1] be DENIED.

In accordance with 28 U.S.C. §636(b), Fed.R.Civ.P. 72(b) and Rule 10(b)(3), Rules Governing Section 2254 Cases in the United States District Courts, any objections to this report and recommendation must be filed with the Clerk of the Court within ten (10) days of the receipt of this report. Failure to file objections within the time specified waives the right to appeal from the judgment of the District

Court based upon the findings and recommendations of the Magistrate Judge. *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

DATED this 4th day of August, 1996.

Frank H. McCarthy

FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

THOMAS WAITE and MARGARET WAITE,

Plaintiffs,

vs.

NEOAX, INC., a Delaware corporation, BROUGHAM SEATING, INC., FLEMING & SON CORPORATION d/b/a METAL SPECIALTIES MFG. COMPANY, AVM PRODUCTS, a Texas corporation, BUCO, INC., a Texas corporation, and DARYL HAYES,

Defendants.

Case No. 95 C 263H

ORDER OF DISMISSAL WITHOUT PREJUDICE

The Court, having before it the written Joint Stipulation for Dismissal without Prejudice of all claims against Fleming & Son Corporation d/b/a Metal Specialties Manufacturing Company presently pending herein, signed by all parties to this litigation with claims pending against Fleming & Son Corporation d/b/a Metal Specialties Manufacturing Company, finds that based upon the agreement of the parties the Joint Stipulation for Dismissal without Prejudice should be granted, and

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the claims against Fleming & Son Corporation d/b/a Metal Specialties Manufacturing Company are hereby dismissed without prejudice.

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IT IS SO ORDERED this 5TH day of AUGUST, 1996.

UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TROY ZICKEFOOSE,

Plaintiff,

vs.

AMERICAN FIDELITY INSURANCE COMPANY d/b/a CIMARRON INSURANCE, a Kansas corporation, and AMERICAN FIDELITY CREDIT CORPORATION, a Kansas corporation, and JOHN MUNDING,

Defendants.

Case No. 96-CV-501-B

ORDER

The Court has for consideration Defendants American Fidelity Insurance Company d/b/a Cimarron Insurance Company ("AFIC") and John Munding's ("Munding") Motion to Dismiss Munding, pursuant to Fed.R.Civ.P. 12(b)(6). Specifically, AFIC and Munding allege Plaintiff Troy Zickefoose's ("Zickefoose") claims against Munding are barred by the doctrine of *res judicata*. After a review of the record and applicable legal authorities, the Court hereby GRANTS AFIC and Munding's Motion to Dismiss Munding.

Procedural History

As a result of an automobile accident, Zickefoose sought insurance coverage from Defendant Cimarron Insurance Company ("Cimarron"). Munding is an agent of Cimarron. Less than satisfied with the outcome of his dealings with Cimarron, Zickefoose filed suit in Pawnee County District Court, Case No. CJ-94-144, naming Cimarron as the sole corporate defendant. Zickefoose added claims against Munding individually for breach of contract, negligence in handling Zickefoose's

claims, and negligence in selling and providing of insurance to Zickefoose.

The Pawnee County District Court, J. Henry, sustained a Motion for Summary Judgment in favor of Munding, but denied Cimarron's Motion for Summary Judgment. Thereafter, Zickefoose dismissed the remaining claims in the Pawnee County case. Zickefoose then refiled the same claims against American Fidelity Insurance Company d/b/a Cimarron Insurance Company, American Fidelity Credit Corporation ("AFCC") and Munding in the Tulsa County District Court, Case No. CJ-96-2177. AFIC and Munding removed the Tulsa County case to this Court pursuant to 28 U.S.C. §1441 (a).

Legal Analysis

Subject matter jurisdiction based on diversity of citizenship exists when the amount in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between citizens of different states. 28 U.S.C. § 1332(a)(1). Zickefoose and Munding are both Oklahoma residents. However, AFIC and Munding contend Munding should be dismissed pursuant to Fed.R.Civ.P. 12(b)(6).

To dismiss a complaint and action for failure to state a claim upon which relief can be granted, it must appear beyond doubt that Plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41 (1957). The allegations of the Complaint must be taken as true and all reasonable inferences from them must be indulged in favor of complainant. Olpin v. Ideal National Ins. Co., 419 F.2d 1250 (10th Cir. 1969), *cert. denied*, 397 U.S. 1074 (1970). AFIC and Munding contend the instant claims against Munding are barred by the doctrine of *res judicata*.

According to the doctrine of *res judicata*, a final judgment on the merits of an action

precludes relitigation of the same cause of action by the identical parties. Clark v. Haas Group, Inc., 953 F.2d 1235 (10th Cir. 1992). The purpose of this doctrine is to preserve the finality of judicial decisions. Id. The federal courts generally accord preclusive effect to issues decided by state courts. Allen, et al v. McCurry, 449 U.S. 90, 95 (1980); *see also* Montana v. United States, 440 U.S. 147, 153 (1978).

An issue before this Court is whether a final judgment on the merits of Zickefoose's claims against Munding has been rendered. Zickefoose contends the Pawnee County District Court Minute Order filed January 31, 1996 which granted summary judgment to Munding was interlocutory. Zickefoose attempts to persuade the Court a motion for summary judgment granted to one of several defendants is not final or appealable absent both express determination there is not just reason for delay and express direction for filing of final judgment. Okla. Stat. tit 12, §994; *see also* Davis v. Gray, 875 P.2d 1145 (Okla. 1994). Further, Zickefoose argues, without such a determination, summary judgment is not final until final judgment on all claims and parties is entered. Id. As far as this argument is concerned, the Court agrees.

However, AFIC and Munding correctly assert the dismissal of the Pawnee County case by Zickefoose caused the Order granting summary judgment to become final. Patmon v. Block, 851 P.2d 539, 543 (Okla. 1993). Zickefoose took no steps to appeal or to preserve the issue for purposes of appeal of Judge Henry's Order granting summary judgment to Munding. This failure precludes any further opportunity to litigate the same claim against Munding under the doctrine of *res judicata.* Thus, Munding was not a proper party to the removed Tulsa County action. Accordingly, the Court hereby GRANTS AFIC and Munding's Motion to Dismiss Munding.

Having determined Zickefoose's present claims against Munding are barred and Munding is

dismissed, the Court now turns to the issue of whether it has subject matter jurisdiction over the remaining issues. It is undisputed diversity of citizenship exists between Zickefoose and the named corporate defendants. The Notice of Removal indicates the amount in controversy exceeds $50,000, exclusive of interest, attorney fees and costs. (Docket # 1, pg. 2). Thus, the Court FINDS it has subject matter jurisdiction pursuant to 28 U.S.C. § 1332(a)(1).

Pursuant to Local Rule 54, Munding's costs and fees accrued in the instant litigation will be awarded upon proper application.

Conclusion

AFIC and Munding's Motion to Dismiss Munding is GRANTED. The Court FINDS it has subject matter jurisdiction over the remaining issues. Munding is awarded costs and fees of this litigation upon proper application.

IT IS SO ORDERED this 2nd day of August, 1996.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARION PARKER,

Plaintiff,

vs.

BANCOKLAHOMA MORTG. CO., HARRY MORTG. CO., BRUMBAUGH & FULTON, COMMONWEALTH MORTG. CO., FIRST MORTG. CO., NORWEST MORTG. CO., and BOATMEN'S FIRST NATIONAL BANK OF OKLAHOMA,

Defendants.

Case No. 92-C-664-J

ORDER

The undersigned Magistrate Judge entered findings of fact and conclusions of law in this case on June 25, 1996. [Doc. No. 167]. The undersigned entered judgment on these findings of fact and conclusion of law also on June 25, 1996. [Doc. No. 168]. The findings of fact, conclusions of law and the judgment all reflect on their face that they were entered in accordance with 28 U.S.C. § 636(c)(1) and the consent of all the parties.

Plaintiff has filed a *pro se* motion to "Setaside [sic], Vacate, Modify and Recommit to Magistrate Judge for Recommendation by Special Master." [Doc. No. 171]. In support of this motion, Plaintiff also filed a *pro se* brief. [Doc. No. 172]. Essentially, Plaintiff argues that the undersigned Magistrate Judge lacked jurisdiction to enter a final determination in this case pursuant to 28 U.S.C. § 636(c)(1) because

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the Plaintiff never gave his consent. Plaintiff is, however, mistaken.

Plaintiff was represented in this matter by his attorney, Michael Braswell. A brief review of the court file reflects the fact that Mr. Braswell filed and signed many pleadings on Plaintiff's behalf. In particular, on May 2, 1996, Mr. Braswell executed a "Trial Consent Form" on behalf of his client. [Doc. No. 159]. A copy of the "Trial Consent Form" is attached to this Order, and it provides as follows:

> In accordance with the provisions of 28 U.S.C. §636(c), the parties to the above-captioned civil matter hereby waive their right to proceed before the assigned District Judge and consent to have a Magistrate Judge conduct any and all further proceedings in the case, including but not limited to the trial of the case, or in the appropriate case, the review of a final administrative decision by the Secretary of Health and Human Services, and the entry of any order, opinion or Judgment.
>
> The parties elect, in accordance with 28 U.S.C. § 636(c)(3) and Rule 73(c) of the Fed.R.Civ.P., to take the normal appeal route in this case to the United States Court of Appeals for the Tenth Circuit.

[Doc. No. 159].

By executing the "Trial Consent Form," Michael Braswell consented on behalf of Plaintiff to the full jurisdiction of the undersigned Magistrate Judge. Plaintiff "voluntarily chose this attorney as his representative in th[is] action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'" Smith v. U.S., 834 F.2d 166, 170 (10th Cir. 1987) (quoting Smith v.

Ayer, 101 U.S. [11 Otto] 320, 326 (1879) (footnote omitted)). See also Frank v. Bloom, 634 F.2d 1245, 1251 (10th Cir. 1980) (a client is bound by his lawyer's admissions).

CONCLUSION

Plaintiff's motion to "Setaside [sic], Vacate, Modify and Recommit to Magistrate Judge for Recommendation by Special Master" [doc. no. 171] is **DENIED**. The Court's June 25, 1996 Judgment stands as the Judgment of this Court. Plaintiff's only recourse, if he believes that error has been committed by this Court, is to appeal to the United States Court of Appeals for the Tenth Circuit.

IT IS SO ORDERED.

Dated this 5 day of August 1996.

Sam A. Joyner
United States Magistrate Judge

FILED

MAY - 2 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

Marion Parker

Plaintiff(s),

v.

BancOklahoma Mortg. Co.; et al.

Defendant(s).

Case No. 92-C-664-B

TRIAL CONSENT FORM
(To Transfer Entire Case to a Magistrate Judge for Trial)

In accordance with the provisions of 28 U.S.C. §636(c), the parties to the above-captioned civil matter hereby waive their right to proceed before the assigned District Judge and consent to have a Magistrate Judge conduct any and all further proceedings in the case, including but not limited to the trial of the case, or in the appropriate case, the review of a final adminstrative decision by the Secretary of Health and Human Services, and the entry of any order, opinion or Judgment.

The parties elect, in accordance with 28 U.S.C. §636(c)(3) and Rule 73(c) of the Fed.R.Civ.P., to take the normal appeal route in this case to the United States Court of Appeals for the Tenth Circuit.

Plaintiff Attorney(s)

Defendant Attorney(s)

Boatmen's National Bank of Oklahoma
FIRST
Marilyn Wagner
for BOMC

ORDER OF REFERENCE UPON TRIAL CONSENT
(please check appropriate box)

[X] IT IS HEREBY ORDERED that the above-captioned matter be transferred to a Magistrate Judge for the conduct of all further proceedings and the entry of judgment in accordance with 28 U.S.C. §636(c)(3) and the foregoing consent of the parties.

[ ] IT IS HEREBY ORDERED that the request for transfer to a Magistrate Judge upon consent of the parties is DENIED.

5-1-96
DATE

Thomas R. Brett
UNITED STATES DISTRICT JUDGE

Note: An Optional Trial Consent Form is available upon request from the clerk providing for appeal to the District Judge in accordance with 28 U.S.C. §636(c)(4), with no further appeal to the United States Court of Appeals as of right.

'96 03:34PM P13.3 ABNEY ET AL

FILE

MAY - 2 1996

Phil Lombardi, Cl
U.S. DISTRICT COU

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

Marion Parker

Plaintiff(s),

v.

BancOklahoma Mortg. Co.; et al.

Defendant(s).

Case No. 92-C-664-B

TRIAL CONSENT FORM

(To Transfer Entire Case to a Magistrate Judge for Trial)

In accordance with the provisions of 28 U.S.C. §636(c), the parties to the above-captioned civil matter hereby waive their right to proceed before the assigned District Judge and consent to have a Magistrate Judge conduct any and all further proceedings in the case, including but not limited to the trial of the case, or in the appropriate case, the review of a final administrative decision by the Secretary of Health and Human Services, and the entry of any order, opinion or judgment.

The parties elect, in accordance with 28 U.S.C. §636(c)(3) and Rule 73(c) of the Fed.R.Civ.P., to take the normal appeal route in this case to the United States Court of Appeals for the Tenth Circuit.

Plaintiff Attorney(s)

Defendant Attorney(s)

ORDER OF REFERENCE UPON TRIAL CONSENT

(please check appropriate box)

[X] IT IS HEREBY ORDERED that the above-captioned matter be transferred to a Magistrate Judge for the conduct of all further proceedings and the entry of judgment in accordance with 28 U.S.C. §636(c)(3) and the foregoing consent of the parties.

[ ] IT IS HEREBY ORDERED that the request for transfer to a Magistrate Judge upon consent of the parties is DENIED.

5-1-96
DATE

UNITED STATES DISTRICT JUDGE

Note: An Optional Trial Consent Form is available upon request from the clerk providing for appeal to the District Judge in accordance with 28 U.S.C. §636(c)(4), with no further appeal to the United States Court of Appeals as of right.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

RENARD ELVIS NELSON,

Plaintiff,

vs.

No. 96-C-626-B

STANLEY GLANZ, and TULSA COUNTY JAIL,

Defendants.

ORDER

On July 10, 1996, Plaintiff submitted a motion for leave to proceed in forma pauperis along with a civil rights complaint realleging denial of a bland diet as he did in Case No. 95-CV-994-H. In particular Plaintiff alleges that Defendants repeatedly fail to provide him with a bland diet in spite of their statements in the Special Report in Case No. 95-CV-994-H.

The Court believes that Plaintiff's claims about his diet are better addressed in Case No. 95-CV-994-H where Plaintiff could seek permission to amend the complaint to incorporate the events which occurred during the last couple of months.[1]

ACCORDINGLY, IT IS HEREBY ORDERED that Plaintiff's motion for leave to proceed in forma pauperis is DENIED and that this action is DISMISSED WITHOUT PREJUDICE as duplicitous. The Clerk shall MAIL to Plaintiff a copy of the complaint and of the letters and

[1] Pursuant to Local Rule 9.3.C, Plaintiff would need to file a motion for leave to amend along with a proposed amended complaint.

attached affidavits which he submitted to the Court on July 11 and July 16, 1996, respectively.

SO ORDERED this 2nd day of Aug, 1996.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

KATHY KEIM,

Plaintiff,

vs.

ROCKY BEVARD, et al.,

Defendants.

Case No. 96-C-16-BU

ADMINISTRATIVE CLOSING ORDER

As Plaintiff and the remaining Defendants have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceeding for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If the parties have not reopened this case within 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, Plaintiff's action against the remaining Defendants shall be deemed to be dismissed with prejudice.

Entered this 2nd day of ~~July~~ August, 1996.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 2 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

CHERYL TIGER,

Plaintiff,

vs.

MAYES COUNTY JAIL, HAROLD BERRY, GEORGE KLATTS, and the MAYES COUNTY COMMISSIONERS,

Defendants.

No. 96-CV-533-BU

ENTERED ON DOCKET
DATE 8-5-96

ORDER

On June 12, 1996, Plaintiff filed a civil rights complaint against the Mayes County Jail, Sheriff Harold Berry, and the Mayes County Commissioners, complaining about the conditions of confinement at the Mayes County Jail. On June 20, 1996, the Clerk's Office notified Plaintiff that his complaint was unsigned and that he needed to submit a motion for leave to proceed in forma pauperis. The above correspondence was returned to the Court on June 25, 1996, with the notation that Plaintiff was no longer at the Mayes County Jail.

ACCORDINGLY, IT IS HEREBY ORDERED that this action is DISMISSED WITHOUT PREJUDICE for lack of prosecution.

SO ORDERED THIS 2nd day of August, 1996.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BILL ROGERS,

Plaintiff,

vs.

MAYES COUNTY JAIL, HAROLD BERRY, GEORGE KLATTS, and the MAYES COUNTY COMMISSIONERS,

Defendants.

No. 96-CV-532-BU

ORDER

On June 12, 1996, Plaintiff filed a civil rights complaint against the Mayes County Jail, Sheriff Harold Berry, and the Mayes County Commissioners, complaining about the conditions of confinement at the Mayes County Jail. On June 20, 1996, the Clerk's Office notified Plaintiff that his complaint was unsigned and that he needed to submit a motion for leave to proceed in forma pauperis. The above correspondence was returned to the Court on June 25, 1996, with the notation that Plaintiff was no longer at the Mayes County Jail.

ACCORDINGLY, IT IS HEREBY ORDERED that this action is DISMISSED WITHOUT PREJUDICE for lack of prosecution.

SO ORDERED THIS 2nd day of August, 1996.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

BRIGHT STAR DESIGNS, INC.	§	
	§	
	§	
Plaintiff,	§	
	§	Civil Action No. 96-C-256-BU
v.	§	
	§	
J. KINDERMAN & SONS, INC.	§	JURY DEMANDED
	§	
Defendant.	§	

NOTICE OF DISMISSAL

COMES NOW Plaintiff, BRIGHT STAR DESIGNS, INC., pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure, hereby dismisses without prejudice all causes of action in its Complaint. The Complaint has not been served on Defendant and Defendant has not appeared or served an Answer to the Complaint filed by the Plaintiff.

Respectfully Submitted,

CATALANO, ZINGERMAN & ASSOCIATES

Date: 7-31-96

By: Frank J. Catalano *
Frank J. Catalano * signed with permission
The Avanti Building
810 South Cincinnati, Suite 200
Tulsa, OK 74119-1612
Telephone: (918) 584-8787
Facsimile: (918) 599-9889

COUNSEL FOR PLAINTIFF
BRIGHT STAR DESIGNS, INC.

OF COUNSEL:

TOBOR & GOLDSTEIN, L.L.P.

Douglas H. Elliott
Edward W. Goldstein
Darin H. Duphorne
1360 Post Oak Blvd., Suite 2300
Houston, TX 77056
713/877-1515

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

AMELIA JEAN NOVAK,

Plaintiff,

v.

No. CV 96-619K

JOHN F. GARNECKY-NOVAK,

Defendant.

NOTICE OF DISMISSAL WITHOUT PREJUDICE

PURSUANT TO RULE 41(A.)(1) F.R.C.P.

COMES NOW the Plaintiff and gives notice of the dismissal of the above styled and numbered cause without prejudice to the refiling thereof.

FRY & ELDER

James R. Elder OBA #2660
906 S. Cheyenne
Tulsa, Oklahoma 74119
918-585-1107
Attorney for Plaintiff

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the date of filing the above instrument, I caused a true and correct copy to be mailed to:

Mr. Mark A. Zannotti
525 S. Main, Suite 600
Tulsa, OK 74104-4509
Attorney for Defendant

James R. Elder

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DWAYNE BARBER, an individual,

Plaintiff,

v.

STAIRMASTER SPORTS/ MEDICAL PRODUCTS, L.P., a Delaware limited partnership,

Defendant.

Case No. 95-C-790K

JOINT STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, the Plaintiff, Dwayne Barber, and the Defendant, StairMaster Sports/Medical Products, L.P., jointly stipulate and agree that this action should be and is hereby dismissed with prejudice.

The parties have agreed to bear their own costs and attorney fees and to not attempt to shift the burden of such costs and fees to the opposing party through the Federal Rules of Civil Procedure, or through state or federal cost or fee shifting statutes.

Thomas L. Bright
1799 East 71st Street
Tulsa, OK 74136-5108

ATTORNEYS FOR PLAINTIFF

J. Ronald Petrikin, OBA #7092
Nancy E. Vaughn, OBA #9214
Crowe & Dunlevy
321 South Boston, Suite 500
Tulsa, OK 74103-3313
(918) 592-9800
(918) 592-9801

ATTORNEYS FOR DEFENDANT

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

AUG 1 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

KEVIN SMITH AND CINDI SMITH

Plaintiffs,

vs.

OPTIMUM CREDIT SERVICES, L.L.C, a Texas corporation,

Defendant.

Case No. CIV-96C-187B

ENTERED ON DOCKET
AUG 0 2 1996
DATE

DISMISSAL WITH PREJUDICE TO REFILING

Come now the plaintiffs, Kevin and Cindy Smith, and, in consideration of payment in full of settlement proceeds by defendant Optimum Credit Services, L.L.C., dismisses the above-styled and numbered matter with prejudice to refiling.

Respectfully submitted,

Patrick E. Moore, OBA# 6351
P.O.Box 890240
Oklahoma City, OK 73189
405/631-0981

CERTIFICATE OF MAILING

This will certify that a true and correct copy of the foregoing Dismissal With Prejudice was sent postage prepaid to the undersigned this the 30 day of July, 1996.

OPTIMUM CREDIT SERVICES, INC.
attn: Mr. Chris Falco
2672 GRAVEL DR.
FORTWORTH, TX. 76118

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TIMOTHY GEORGE RICK,

Petitioner,

vs.

LARRY FIELDS, et al,

Respondent.

No. 95-CV-600-E

JUDGMENT

In accord with the Orders denying Petitioner's application for a writ of habeas corpus, the Court hereby **enters judgment** in favor of Respondent and against the Petitioner Timothy George Rick.

SO ORDERED THIS 31st day of July, 1996.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TIMOTHY GEORGE RICK,)
)
Petitioner,)
)
vs.) No. 95-CV-600-E
)
LARRY FIELDS, et al,)
)
Respondent.)

ORDER

This matter comes before the Court on Petitioner's application for a writ of habeas corpus. On May 15, 1996, the Court denied all grounds for habeas relief except for ground five. Respondent and Petitioner have now briefed ground five and the Court can address it on the merits.

On February 6, 1989, Petitioner pled guilty to First Degree Murder and received a sentence of life imprisonment. Petitioner did not appeal his conviction. In ground five of the petition, Petitioner contends counsel provided ineffective assistance of counsel when she failed to advise the court of alleged off-the-record threats made to force petitioner to plead guilty. In his reply, Petitioner does not specify the threats made by his defense counsel. He admits, however, that his counsel advised him to plead guilty to murder in the first degree and get a life sentence in order to eliminate the chance of the death penalty.

To establish ineffective assistance of counsel, a petitioner must show that his counsel's performance was deficient and that the deficient performance prejudiced his defense. Strickland v.

Washington, 466 U.S. 668, 687 (1984); Osborn v. Shillinger, 997 F.2d 1324, 1328 (10th Cir. 1993). A petitioner can establish the first prong by showing that counsel performed below the level expected from a reasonably competent attorney in criminal cases. Strickland, 466 U.S. at 687-88. To establish the second prong, a petitioner who has pled guilty must show a reasonable probability that without counsel's errors, he would not have pled guilty and would have insisted on proceeding to trial. Hill v. Lockhart, 474 U.S. 52 (1985).

Even assuming counsel's conduct fell below the level expected from a reasonably competent attorney in criminal cases, Petitioner has not established that absent counsel's threats he would not have pleaded guilty and would have insisted on proceeding to trial. Moreover, the trial court clearly advised Petitioner at the guilty plea proceeding that the State would not seek the death penalty in his case. Therefore, the Court concludes that counsel's conduct did not amount to constitutionally ineffective assistance of counsel.

ACCORDINGLY, IT IS HEREBY ORDERED that ground five of the petition for a writ of habeas corpus is DENIED.

SO ORDERED THIS 31st day of July, 1996.

JAMES O. ELLISON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

EOD 8/2/96

CATHY SULLINS,

Plaintiff,

v.

MARK HENSON, individually, and as an employee and representative of the United States Junior Chamber of Commerce; STEVEN LAWSON, individually, and as an employee and representative of the United States Junior Chamber of Commerce; GARY TOMPKINS, individually, and as an employee and representative of the United States Junior Chamber of Commerce; and the UNITED STATES JUNIOR CHAMBER OF COMMERCE, a Missouri Corporation,

Defendants.

Case No. 95-C-804-B

ORDER

The Court has for consideration Defendant United States Junior Chamber of Commerce's ("USJCC") Motion for Summary Judgment pursuant to Fed.R.Civ.P. 56. USJCC's Motion seeks summary judgment on Plaintiff Cathy Sullins' ("Sullins") remaining claims of intentional infliction of emotional distress, hostile work environment and *quid pro quo* sexual harassment and sexual discrimination in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), constructive discharge, and tortious breach of contract. After a review of the record and applicable legal authorities, the Court hereby GRANTS USJCC's Motion for Summary Judgment on Sullins' claim of intentional infliction of emotional distress, and DENIES USJCC's Motion for Summary Judgment on Sullins claims of hostile work environment and *quid pro quo* sexual harassment and sexual

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discrimination in violation of Title VII, constructive discharge and tortious breach of contract.

Procedural History

Sullins filed a Complaint on August 21, 1995, alleging hostile work environment and *quid pro quo* sexual harassment and sexual discrimination in violation of Title VII; sexual discrimination and harassment in violation of Oklahoma's Anti-Discrimination Act, Okla Stat. Ann. tit. 25, § 1302 (West 1987) ("OADA"); intentional infliction of emotional distress; constructive discharge; and tortious breach of contract.

On October 17, 1995, the Court dismissed Sullins' Title VII claims against individual Defendants Mark Henson ("Henson"), Steven Lawson ("Lawson") and Gary Tompkins ("Tompkins") on the grounds Title VII does not allow recovery against them in their individual capacities. The Court also dismissed Sullins' OADA claim against USJCC on the grounds the OADA does not afford a private right of action for gender discrimination.

On March 15, 1996, the Court denied USJCC's Motion for Judgment on the pleadings as to Sullins' constructive discharge claim. In the same Order, the Court granted individual Defendants Lawson and Tompkins' Motion for Summary Judgment on Sullins' claim of intentional infliction of emotional distress.

On April 29, 1996, Sullins' Motion to Reconsider the Granting of Defendants Lawson and Tompkins' Motion for Summary Judgment was denied. In addition to the claims surviving the instant Motion, Sullins' claim of intentional infliction of emotional distress against Henson still remains.

Uncontroverted Facts

USJCC has set forth uncontroverted facts numbered 1-62, several with subparts. Sullins accepts as true each fact set forth by USJCC. Sullins sets forth uncontroverted facts numbered 1-38.

USJCC accepts as true, for purposes of this motion, each fact set forth by Sullins except facts 32 and 33 as hereafter stated. The Court hereby incorporates by reference USJCC's uncontroverted facts 1-62 and Sullins' uncontroverted facts 1-38, attached hereto as Court's Exhibit A.

After noticing a direct conflict between Sullins uncontroverted facts 32-33, USJCC uncontroverted fact 29, and USJCC Exhibits F and G, the Court held a hearing in an effort to discern the positions of the parties as to this conflict. The Court ordered counsel for Sullins and USJCC to supplement the record as to this conflict. After receiving the parties' supplemental material, the Court determines the memorandum from Steve Lawson to Mark Henson directing Henson to cease and desist harassment of Sullins, dated February 23, 1994, was personally delivered to Henson. (USJCC Supp. Exhibits, Affidavit of Steve Lawson, Affidavit of Mark Henson). Further, in January 1994 USJCC President and Executive Vice-President orally directed Henson to cease any harassment of Sullins. (USJCC Exhibit F).

The Standard of Fed.R.Civ.P. 56 Motion for Summary Judgment

Summary judgment pursuant to Fed.R.Civ.P. 56 is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986); Windon Third Oil & Gas v. FDIC, 805 F.2d 342 (10th Cir. 1986). In Celotex, 477 U.S. at 317 (1986), it is stated:

> "The plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."

To survive a motion for summary judgment, nonmovant "must establish that there is a genuine issue

of material facts..." Nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita v. Zenith, 475 U.S. 574, 585 (1986). The evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. Conaway v. Smith, 853 F.2d 789, 792 n. 4 (10th Cir. 1988). Unless the Defendants can demonstrate their entitlement beyond a reasonable doubt, summary judgment must be denied. Norton v. Liddel, 620 F.2d 1375, 1381 (10th Cir. 1980).

The Tenth Circuit Court of Appeals decision in Committee for the First Amendment v. Campbell, 962 F.2d 1517 (10th Cir. 1992), concerning summary judgment states:

> "Summary judgment is appropriate if 'there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.' . . . Factual disputes about immaterial matters are irrelevant to a summary judgment determination. . . We view the evidence in a light most favorable to the nonmovant; however, it is not enough that the nonmovant's evidence be 'merely colorable' or anything short of 'significantly probative.' . . .
>
> "A movant is not required to provide evidence negating an opponent's claim. . . . Rather, the burden is on the nonmovant, who 'must present affirmative evidence in order to defeat a properly supported motion for summary judgment.' . . . After the nonmovant has had a full opportunity to conduct discovery, this burden falls on the nonmovant even though the evidence probably is in possession of the movant. (citations omitted). Id. at 1521."

Intentional Infliction of Emotional Distress

The Oklahoma Supreme Court recognized the independent tort of intentional infliction of emotional distress in Eddy v. Brown, 715 P.2d 74 (Okla. 1986). The Eddy court held that in determining whether an action for this tort exists, the narrow standard of Restatement (Second) of Torts § 46 should be applied. Id. Section 46 provides, in relevant part:

> (1) One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other

results from it, for such bodily harm.

Restatement (Second) of Torts, § 46 (1977).

According to Eddy, "[i]t is the trial court's responsibility initially to determine whether the defendant's conduct may reasonably be regarded as sufficiently extreme and outrageous to meet the § 46 standards." Eddy v. Brown, *supra* at 76. "Where, under the facts before the court, reasonable persons may differ, it is for the jury, subject to the control of the court, to determine whether the conduct in any given case has been significantly extreme and outrageous to result in liability." Breeden v. League Services, 575 P.2d 1374, 1377 (Okla. 1978).

In determining whether conduct is "sufficiently extreme and outrageous" to give rise to a claim of intentional infliction of emotional distress, the Oklahoma Supreme Court held that "[c]onduct which, though unreasonable, is neither 'beyond all possible bounds of decency' in the setting in which it occurred, nor is one that can be 'regarded as utterly intolerable in a civilized community,' falls short of having actionable quality." Eddy v. Brown, *supra* at 77; *see also* Restatement (Second) of Torts, § 46 cmt. d (1977). In the recent decision of Starr v. Pearle Vision, Inc., 54 F.3d 1548 (10th Cir. 1995), the Tenth Circuit Court of Appeals, in applying Oklahoma law, held that "[n]othing short of 'extraordinary transgressions of the bounds of civility' will give rise to liability for intentional infliction of emotional distress." Id. at 1558 (*quoting* Merrick v. Northern Natural Gas Co., 911 F.2d 426, 432 (10th Cir. 1990)). In determining whether a jury could reasonably conclude that particular conduct was indeed "extreme" or "outrageous," this Court must focus "on the totality of the circumstances, including the nature of the conduct and the setting in which it occurred." Starr v. Pearle Vision, *supra* at 1559.

Sullins claims certain acts of Defendants Lawson and Tompkins were extreme and outrageous

and designed to intentionally inflict emotional distress upon her. Sullins asserts these acts were performed in their capacity as servants and employees of USJCC, thereby creating liability for USJCC through the doctrine of *respondeat superior*. As the Court in its Order dated March 15, 1996 (Docket #17) granted summary judgment in favor of Defendants Lawson and Tompkins on the issue of intentional infliction of emotional distress, it is axiomatic USJCC is not vicariously liable for such alleged acts of Lawson and Tompkins.

Sullins also contends many acts of Henson were extreme and outrageous and designed to intentionally inflict emotional distress upon her. USJCC cites Haco Drilling Co. v. Burchette, 364 P.2d 674 (Okla. 1961) for the proposition that it will be vicariously liable for Henson's acts only if he acted within the scope of his employment. The Court agrees this principle of agency law is a method of imputing liability to an employer for the intentional acts of an employee. However, in Baker v. Weyerhauser Co., 903 F.2d 1342 (10th Cir. 1990) the issue of employer liability on an intentional infliction of emotional distress claim was further addressed. The Tenth Circuit Court of Appeals affirmed a jury's award of $45,000 actual damages and $45,000 punitive damages against a defendant employer based on the employer's failure to take corrective action against an employee it knew to be harassing the plaintiff.

The record reveals numerous allegations of improper behavior by Henson. The Court is of the opinion the only alleged behavior which could be characterized as sufficiently extreme and outrageous to constitute intentional infliction of emotional distress is Henson allegedly writing obscene comments about Sullins on the restroom wall at the Tulsa International Airport and Henson allegedly distributing pornographic photographs of Sullins to various persons and publicly, and threatening same. USJCC may be liable for any damages suffered by Sullins as a result of Henson's behavior if Henson acted within the scope of his employment or if USJCC failed to take corrective

action after receiving notice of such behavior.

The Court believes USJCC supervisory personnel knew of the relationship between Sullins and Henson and that the relationship included sexual activity. Such sexual activity included mutually welcome sexual intercourse. Apparently with Sullins' acquiescence, pornographic photographs of Sullins were taken by Henson during their mutually welcome affair. When Sullins decided to end the relationship with Henson in late 1993, it is asserted Henson continued to pursue and harass her both at work and outside of work.

Sullins informed USJCC management of Henson's harassment, resulting in a meeting between Sullins, Henson, Lawson and President Matt Shapiro ("Shapiro") on January 19, 1994. At the meeting Henson and Sullins were instructed that "any contact between each other after hours would be considered harassment of an employee and action would be taken." (USJCC Exhibit E). In a February 4, 1994 memorandum to Shapiro, Lawson, and Executive Director John Shiroma ("Shiroma"), Sullins wrote;

> The incidences of harassment that prompted filing of the protective order by me (on January 24, 1994) would not have been necessary if Mark Henson had ceased harassment of me as he had been instructed to do so by the President and Executive Vice President in our meeting on January 19,1994.

(USJCC Exhibit F, p.4).

The Court finds USJCC had knowledge of Henson's harassing conduct. The Court also finds USJCC management took steps to halt Henson's harassment of Sullins, not only during work hours, but after work hours. On February 23, 1994, Lawson issued a memorandum to Henson which read in part;

> The situation has become intolerable. The Jaycees' headquarters' office and employees cannot operate in an environment wherein employees bring deep personal animosities into the workplace.

> For this reason I made it clear during our meeting that you must use common sense and avoid conflicts with Cathy Sullins.
>
> This means that you must strictly comply with the protective order entered by the District Court, and avoid any conduct that could reasonably be construed as harassment of Cathy Sullins. Sending her balloons or parking next to her car are examples of conduct which could lead to further personal conflicts.
>
> ****
>
> Please consider this memorandum as a warning that harassment of any kind of Cathy Sullins will not be tolerated. This memorandum will become a permanent part of your file.

(USJCC Exhibit G, emphasis in original).

The Court is persuaded Henson's acts which could constitute intentional infliction of emotional distress were performed independently, outside the scope of his employment and against USJCC policies and directives. It must follow such acts are not imputable to USJCC. Thus, the Court hereby GRANTS USJCC's Motion for Summary Judgment on Sullins' claim of intentional infliction of emotional distress.

Title VII Claims

Sullins alleges violations of Title VII, 42 U.S.C. §2000e, *et seq.*, specifically hostile work environment and *quid pro quo* sexual harassment and sexual discrimination.

Hostile Work Environment Sexual Harassment

Sexual harassment is now universally recognized as a form of employment discrimination. Meritor Savings Bank v. Vinson, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986). The 10th Circuit has recognized hostile work environment as a distinct category of sexual harassment. Hicks v. Gates Rubber Co., 833 F.2d 1406 (1987). Hostile work environment harassment arises when sexual conduct "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment." Id. Sexual

harassment is behavior "'that would not occur but for the sex of the employee'... 'If the nature of an employee's environment, however unpleasant, is not due to her gender, she has not been the victim of sex discrimination'" Gross v. Burggraf Constr. Co., 53 F.3d 1531, 1537 (10th Cir. 1995). Title VII is violated when the workplace is permeated with discriminatory behavior that is sufficiently severe or pervasive to create a hostile or abusive working environment. Meritor Savings Bank v. Vinson, *supra.*

The Court finds the workplace behavior of Tompkins, if any, and Lawson insufficient to create a hostile work environment. The Court is of the opinion the alleged workplace behavior of co-worker Henson, as detailed in Sullins' memorandums to USJCC management, could create a hostile work environment. (USJCC Exhibits E,F,H,I,J,K). A hostile work environment sexual harassment claim may arise from harassing conduct of co-workers. Marshall v. Nelson Elec., 766 F.Supp. 1018 (10th Cir. 1991). To establish employer liability for sexual discrimination based on co-worker harassment, it must be established the employer, through its agents or supervisory personnel, knew or should have known of sexual harassment and failed to implement prompt and corrective action. Id.

The Court finds USJCC supervisory personnel had notice of Henson's alleged conduct. (USJCC Exhibits E,F,H,I,J,K). Such conduct by Henson is not time barred as the Court believes Henson's alleged acts constitute a continuing course of conduct. Martin v. Nannie and the Newborns, Inc., 3 F.3d 1410 (10th Cir. 1993). The Court also finds USJCC attempted to prevent further harassment of Sullins by Henson through February 23, 1994. (USJCC Exhibit G). Based on Sullins' memorandums to USJCC management, it is alleged Henson continued to harass Sullins after he received the memorandum from Lawson dated February 23, 1994. The record is silent as to whether

further corrective action was taken against Henson by USJCC management after February 23, 1994. The Court is of the opinion reasonable persons could differ in a determination whether the corrective action taken by USJCC after February 23, 1994, if any, was appropriate under the circumstances. Thus, the Court DENIES USJCC's Motion for Summary Judgment on Sullins' claim of hostile work environment sexual harassment.

***Quid pro quo* Sexual Harassment**

"*Quid pro quo* sexual harassment occurs when a supervisor conditions the granting of an economic or other job benefit upon the receipt of sexual favors from a subordinate, or punishes that subordinate for refusing to comply." Lipsett v. University of Puerto Rico, 864 F.2d 881, 897 (1st Cir. 1988); *see also* Hicks v. Gates Rubber Co., 833 F.2d 1406 (10th Cir. 1987). As Henson was merely a co-worker of Sullins with no authority to give or deny a tangible job benefit, the Court declines to consider his acts for purposes of this issue. *See* Marshall v. Nelson Elec., *supra.* Lawson and Tompkins occupied supervisory positions with the USJCC with respect to Sullins. The record is void of evidence showing Tompkins conditioned the granting of an economic or other job benefit upon the receipt of sexual favors from Sullins. Similarly, no evidence exists indicating Sullins was punished for refusing to grant sexual favors to Tompkins.

It is apparent to the Court Lawson wanted to share company with Sullins. It is, however, difficult to establish a precise time frame during which Lawson sought to create a relationship with Sullins beyond that of employer-employee. As early as September 1992 Lawson asked Sullins for a date. (USJCC uncontroverted fact 37). Sullins testified Lawson had asked her out two or three times. (USJCC uncontroverted fact 36). USJCC admits an employee overheard Lawson say to Henson how good Sullins looked and how he would get his turn with her. (USJCC uncontroverted

fact 39).[1] This discussion took place at the USJCC 1993 Christmas party. Further, it is undisputed Lawson told Sullins "that he would rather I make a thousand [expletive] ups and smile at him more." (Sullins uncontroverted fact 16).

Nothing in the record indicates Sullins ever dated Lawson. In fact, Sullins testified she objected to working for Lawson because it was uncomfortable having to "turn down a boss who asked you out socially." (Sullins uncontroverted fact 19). As 1994 progressed, Sullins believed Lawson began to ignore her. (USJCC uncontroverted fact 56(i)). On August 29, 1994, Sullins was transferred by Lawson to the third floor of the USJCC's offices. Henson's office was on the third floor and Lawson knew Sullins had a protective order against Henson. On September 12, 1994, Sullins resigned.

The Court is of the opinion reasonable persons could differ as to whether Lawson's decision to transfer Sullins to an office near Henson was a legitimate business decision or punishment for Sullins' refusal to date him. Therefore, the Court DENIES USJCC's Motion for Summary Judgment on Sullins' claim of *quid pro quo* sexual harassment.

Sexual Discrimination

Under Title VII, sexual discrimination can be based upon sexual harassment or hostile work environment. Meritor Savings Bank v. Vinson, *supra*. As the Court has previously denied USJCC's Motion for Summary Judgment on the issues of hostile work environment and *quid pro quo* sexual harassment, the Court believes an analysis of this issue would lead to the previously reached conclusion a genuine issue of material fact exists whether Sullins was the victim of sexual

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[1]The Court notes it has read a portion of Lawson's deposition wherein he denies having made this statement.

discrimination. Thus, the Court hereby DENIES the USJCC's Motion for Summary Judgment on Sullins' claim of sexual discrimination.

Constructive Discharge

Constructive discharge occurs when an employer by its illegal discriminatory acts deliberately makes or allows the employee's working conditions to become so intolerable that a reasonable person in the employees' position would feel compelled to resign. James v. Sears, Roebuck and Co., 21 F.3d 989, 992 (10th Cir. 1993).

The undisputed facts reveal Sullins was fearful of Henson. Sullins sought and obtained a protective order against Henson. Sullins harbored unconfirmed suspicions Henson was responsible for several reprehensible acts. The Court finds USJCC was aware of this fear through Sullins' internal memorandums to USJCC management. Despite having knowledge of the volatile situation which existed between Sullins and Henson, Lawson transferred Sullins to the floor where Henson officed. Sullins resigned shortly after the transfer.

The Court is of the opinion a fact question exists as to whether the working conditions experienced by Sullins were so intolerable she was compelled to resign. The Court's rulings herein regarding discrimination need not be repeated. The Court DENIES USJCC's Motion for Summary Judgment on Sullins' claim of constructive discharge.

Tortious Breach of Contract (Public Policy Violation)

Sullins' claim of tortious breach of contract is predicated on a public policy exception to the Oklahoma at-will employment doctrine. The specific public policy exception relied on by Sullins prohibits the constructive discharge of an employee in violation of Title VII. *See* Burk v. K-Mart Corporation, 770 P.2d 24 (Okla. 1989). The Court has previously held a fact question exists

regarding Sullins' constructive discharge claim.

The Court filed an Order in the instant case on March 15, 1996 which addressed the issue of whether federal law preempts Sullins' tortious breach of contract claim. The Court incorporates herein the discussion on pages 2-5 of said Order. Specifically, this Court held Sullins' claim of tortious breach of contract is not preempted by federal law pursuant to the Oklahoma Supreme Court's holding in List v. Anchor Paint, 910 P.2d 1011 (1996).

Consistent with the ruling on Sullins' claim of constructive discharge herein, the Court DENIES USJCC's Motion for Summary Judgment on Sullins' claim of tortious breach of contract.

Conclusion

USJCC's Motion for Summary Judgment is GRANTED on Sullins' claim of intentional infliction of emotional distress. USJCC's Motion for Summary Judgment is DENIED on Sullins' claims of hostile work environment sexual harassment, *quid pro quo* sexual harassment, sexual discrimination, constructive discharge and tortious breach of contract. Sullins' claim of intentional infliction of emotional distress against Henson remains.

IT IS SO ORDERED, this 1st day of August, 1996.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

COURT'S EXHIBIT

A

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF OKLAHOMA

CATHY SULLINS, Plaintiff, vs. MARK HENSON, Individually, and as an employee and representative of The United States Junior Chamber of Commerce; STEPHEN LAWSON, Individually, and as an employee and representative of The United States Junior Chamber of Commerce; GARY TOMPKINS, Individually, and as an employee and Representative of The United States Junior Chamber of Commerce; and THE UNITED STATES JUNIOR CHAMBER OF COMMERCE, A Missouri corporation, Defendants.	)	Case No. 95-C-804B (DOCUMENT FILED UNDER SEAL)

OPENING BRIEF OF DEFENDANT THE UNITED STATES JUNIOR CHAMBER OF COMMERCE IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

Statement of Material Facts As To Which No Genuine Issue Exists

For the purposes of this motion only Defendant The United States Junior Chamber of Commerce ("Junior Chamber") accepts as true the following material facts:

1. Plaintiff Cathy Sullins ("Sullins") until September 12, 1994 was an employee of the Junior Chamber. (Paragraph 10 of the complaint admitted in paragraph 10 of the Junior Chamber's answer).

2. The Junior Chamber is, and at all times herein mentioned was, a duly organized and existing non-profit corporation under and by virtue of the laws of the State of Missouri, which has a

principal office located in the County of Tulsa, State of Oklahoma. (Paragraph 5 of the complaint admitted in paragraph 5 of the Junior Chamber's answer; Affidavit of Lawson at ¶ 3[1]).

3. Defendant Stephen Lawson ("Lawson") was at all times material to the complaint a resident of Tulsa County, State of Oklahoma and an employee of the Junior Chamber. Lawson was at all times material to the complaint in a supervisory role to Sullins and he served as executive vice president of the Junior Chamber. (Paragraph 3 of the complaint admitted in paragraph 3 of the Junior Chamber's answer).

4. Defendant Gary Tompkins ("Tompkins") was a resident of Tulsa County, State of Oklahoma, and president of the Junior Chamber during the period June 22, 1994 to June 22, 1995. (Affidavit of Lawson at ¶ 7).

5. Defendant Mark Henson ("Henson") until his resignation on February 28, 1995, was employed in a non-supervisory capacity as a field representative of the Junior Chamber. (Affidavit of Lawson at ¶ 4; Deposition of Sullins at 17, 74[2]).

6. Henson's job responsibilities as a field representative consisted of providing direct assistance, through travel and communication, to officers of state Junior Chamber chapters and local Junior Chamber chapters; assistance in the development and

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[1] Affidavit of Lawson refers to paragraphs of the affidavit of Stephen Lawson, attached hereto under Tab A.

[2] Deposition of Sullins refer to pages of the deposition of Cathy Sullins taken on November 1, 1995. The relevant pages are attached under Tab B.

implementation of national Junior Chamber training programs, meetings, events, activation and recruitment programs. He was subject to the supervision of the membership services executive director. (Affidavit of Lawson at ¶ 5).

7. A copy of the Junior Chamber's Sexual Harassment Policy in effect during the times relevant to this matter is attached under Tab C. (Affidavit of Lawson at ¶ 6).

8. Sullins started dating Defendant Henson in October of 1993 and dated him through December of 1993. (Deposition of Sullins at 75).

9. While dating Henson Sullins spent nights with him at his apartment. (Deposition of Sullins at 76).

10. Sullins had sexual intercourse with Henson at his apartment. (Deposition of Sullins at 76).

11. Sullins could not remember how many times she had sex with Henson or even give an approximate estimate. (Deposition of Sullins at 76-77).

12. Sullins went to Eureka Springs, Arkansas with Henson on one occasion and stayed two or three days. (Deposition of Sullins at 77).

13. While in Eureka Springs Sullins had sexual intercourse with Henson. (Deposition of Sullins at 77).

14. While in Eureka Springs Henson took at least 15 photographs of Sullins. (Deposition of Sullins at 78).

15. Sullins posed for some of the photographs. (Deposition of Sullins at 79).

16. Copies of some of the photographs taken of Sullins by Henson, and which were produced by Sullins in response to a request to produce, are attached under Tab D.

17. Henson gave Sullins an engagement ring and she kept it a week or two before returning it. (Deposition of Sullins at 88-89).

18. For a time while dating Henson, Sullins thought she was in love with Henson. (Deposition of Sullins at 89).

19. Sullins dated Pat DeCorte up until she started dating Henson. (Deposition of Sullins at 91).

20. While dating Pat DeCorte, DeCorte spent nights in Sullins apartment. (Deposition of Sullins at 91-92).

21. Sullins had sexual intercourse with DeCorte but she has no idea of the number of times. (Deposition of Sullins at 91-92).

22. After breaking up with Henson Sullins started seeing Pat DeCorte again. (Deposition of Sullins at 93).

23. On January 19, 1994 a meeting was held between Sullins, Henson, Lawson and Matt Shapiro who was the then President of the Junior Chamber. (Deposition of Sullins at 127).

24. At the January 19, 1994 meeting Shapiro told Sullins and Henson that he was not going to tolerate harassment "of each other" and that Henson and Sullins were not to have anything to do with each other. Shapiro also said that the pictures had better be gathered up and returned to Sullins. (Deposition of Sullins at 127-128).

25. At the January 19, 1994 meeting Henson denied that he had the photographs. (Deposition of Sullins at 127).

26. Beginning in January of 1994 and continuing until May 2, 1994, Sullins prepared and delivered to the Junior Chamber memoranda which documented the harassment she was enduring. (Deposition of Sullins at 25; Exhibits "6", "7", "8", "9", "10", and "12" to Sullins Deposition which are attached under Tabs E, F, H, I, J, and K).

27. Attached under Tab E is a memorandum dated January 27, 1994 from Sullins to the Junior Chamber President, Matt Shapiro, which sets forth a recap of events that occurred after the January 19, 1994 meeting between Henson, Sullins, Lawson and Shapiro. (Exhibit 6 to Sullins Deposition).

28. Attached under Tab F is a memorandum dated February 4, 1994 from Sullins to the Junior Chamber President Matt Shapiro and others in which Sullins sets forth the events surrounding her request for a protective order and a copy of the protective order entered by Tulsa District Judge Pete Messler. (Exhibit 7 to Sullins Deposition).

29. Attached under Tab G is a memorandum dated February 23, 1994 issued to Mark Henson by Steve Lawson, which warns Henson that harassment of Sullins will not be tolerated and that the memo will become a permanent part of Henson's file. (Exhibit "B" to Affidavit of Lawson).

30. Attached under Tab H is a memorandum dated March 30, 1994 from Sullins to the Junior Chamber President Matt Shapiro and others which is an update on the instances that occurred since the February 21, 1994 meeting between Henson, Lawson and others

referred to in the February 23, 1994 memorandum attached under Tab G. (Exhibit B to Affidavit of Lawson).

31. Attached under Tab I is a memorandum from Sullins dated April 29, 1994 to the Junior Chamber President, Matt Shapiro and others which updates the harassment protective order against Mark Henson. (Exhibit 9 to Sullins deposition).

32. Attached under Tab J is a memorandum from Sullins dated April 18, 1994 to the Junior Chamber President, Matt Shapiro and others which updates the harassment protective order against Henson. (Exhibit 10 to Sullins deposition).

33. Attached under Tab K is a memorandum from Sullins dated May 2, 1994 to the Junior Chamber President, Matt Shapiro and others which updates the harassment protective order against Henson. (Exhibit 12 to Sullins deposition).

34. Sullins never initiated any proceeding to have the protective order of Judge Messler enforced against Henson. (Deposition of Sullins at 59-60, 209).

35. Sullins admits that Henson never physically struck her and complains only that "the sex got pretty rough". (Deposition of Sullins at 209).

36. Lawson asked Sullins to go out with him two or three times (Deposition of Sullins at 98).

37. One occasion was in September of 1992 when Lawson asked Sullins to go see a movie. She did not accept (Deposition of Sullins at 98).

38. Sullins recalls that Lawson asked her out in Tulsa on one occasion. She did not accept (Deposition of Sullins at 99).

39. At a Junior Chamber Christmas party in December of 1993, an employee and her spouse heard Lawson say to Defendant Mark Henson ("Henson") how good Sullins looked and that he (Lawson) would get his turn with her (Deposition of Sullins at 104).

40. In September of 1993 Sullins attended the Junior Chamber Governmental Affairs Leadership Seminar. (Deposition of Sullins at 105).

41. After her responsibilities as a staff officer ended, Sullins returned to her hotel room to change clothes (Deposition of Sullins at 105).

42. While in her hotel room Sullins heard the key to her hotel room come open and Lawson walked in. She asked him to please leave until she finished dressing, which he did. (Deposition of Sullins at 106).

43. After Sullins finished dressing Lawson came back in the room, and he laughed and said that's the most fun he had had all weekend (Deposition of Sullins at 106).

44. Sullins' roommate, Susan Lively, told Sullins that she ("Lively") had given the key to the hotel room to Lawson. His purpose, she understood, was to obtain Junior Chamber documents kept in the room. (Deposition of Sullins at 188-189).

45. Lawson once told Sullins that she didn't smile at him enough (Deposition of Sullins at 108).

46. In February of 1994 Defendant Gary Tompkins ("Tompkins") asked Sullins out to dinner when Tompkins was a member of the Junior Chamber executive committee (Deposition of Sullins at 109). She accepted. (Deposition of Sullins at 118).

47. At the World Congress of Junior Chamber International held in Hong Kong in November of 1993, Tompkins went to Sullins' hotel room (Deposition of Sullins at 111).

48. He knocked on Sullins' hotel room door and she opened the door and he asked if he could come in (Deposition of Sullins at 111).

49. Tompkins thereafter went into the hotel room and embraced Sullins and kissed her (Deposition of Sullins at 111-112).

50. Thereafter Pam Bruns (another staff officer), Sullins and Tompkins sat in Sullins' hotel room and had a friendly chit chat (Deposition of Sullins at 113).

51. After the incident where Tompkins kissed Sullins, Sullins, Pam Bruns and Tompkins went out to dinner (Deposition of Sullins at 114).

52. In September of 1992 when Tompkins was a Junior Chamber state president, following a long talk in the headquarters hotel bar in Washington, D.C., Tompkins followed Sullins to the hotel elevator and kissed her (Deposition of Sullins at 115-116).

53. Sullins never complained to anyone about the fact that Tompkins had kissed her on the elevator in Washington, D.C., or in her hotel room at Hong Kong (Deposition of Sullins at 116).

54. Sullins resigned from her job with the Junior Chamber on September 12, 1994. (Deposition of Sullins at 12-13; Exhibit 1 to Sullins deposition).

55. In the last paragraph of her letter of resignation, Sullins stated:

> I feel that you have constructively discharged me based upon what has occurred to me in the last two weeks combined with what previously took place. . . . (Exhibit 1 to Deposition of Sullins, attached under Tab L).

56. The events which occurred in the last two weeks prior to her resignation (August 29, 1994 to September 12, 1994) and which led to her resignation were:

a. She was transferred out of her position as Senior Administrative Associate for the Executive Vice President, to a position as Coordinator of Special Events for the 75th Anniversary in the meetings department of the Junior Chamber. (Deposition of Sullins at 13, 191).

b. At the time of the transfer she requested that she be permitted to switch places with Vicki Wilson who was the secretary and assistant to Gary Tompkins. (Deposition of Sullins at 71).

c. In her new position in the meetings department Sullins had a private office and her compensation and fringe benefits remained the same as in her former position. (Deposition of Sullins at 14).

d. Her new position was located on the third floor of the Junior Chamber headquarters building and Defendant Mark

Henson had an office on the third floor. (Deposition of Sullins at 13).

e. During the two days that she was in her new job she did nothing. (Deposition of Sullins at 14).

f. Her supervisor, Defendant Lawson gave her a derogatory job evaluation. (Deposition of Sullins at 16).

g. Lawson told Sullins to show her replacement the ropes and to show her how to perform Sullins' job. (Deposition of Sullins at 17).

h. She attended the Junior Chamber governmental affairs leadership seminar in Washington, D.C., during the period September 1 to September 5, 1994 and took the minutes at the executive committee meetings, the board of directors meeting and a planning committee meeting. (Deposition of Sullins at 17-18).

i. She was ignored by some of the staff of the Junior Chamber and Defendant Lawson and Gary Tompkins. (Deposition of Sullins at 19).

j. She took eight hours of vacation on September 6, 1994. (Deposition of Sullins at 23).

k. She took compensatory time off on September 7, 8 and 9, 1994. (Deposition of Sullins at 23-24).

l. September 10 and 11, 1994, fell on a Saturday and Sunday and Sullins did not work those days. (Exhibits 2 and 3 to Sullins deposition, attached under Tab M).

57. No other events occurred in August or September, 1994, which made Sullins feel that she should resign her job. (Deposition of Sullins at 24-25).

58. For the month of July, 1994, the only events which occurred which led to her resignation were:

a. She had to take minutes at the Junior Chamber Executive Committee meeting at the Founders' Home. Mark Henson attended the meeting but never spoke. When the meeting was over Mark Henson was standing next to her car talking to a co-worker. (Deposition of Sullins at 30).

b. Sullins was not spoken to by Steve Lawson and Gary Tompkins unless absolutely necessary. (Deposition of Sullins at 31-32).

59. The events which occurred in June of 1994 which led to Sullins' resignation were:

a. Defendant Henson was assigned to a Junior Chamber event cattycorner to the staff room at the annual meeting of the Junior Chamber in Orlando, Florida. (Deposition of Sullins at 35).

b. Henson went to the staff room where Sullins was assigned. He was boisterous and bragged about women he was going to take out. Because he was distracting, Mark Kuss, another Junior Chamber employee, asked Henson to leave and Henson did leave. (Deposition of Sullins at 35-36).

c. Henson then stood outside the railing directly in front of the staff room and preceded to smile at Sullins with his cocky grin. (Deposition of Sullins at 36).

60. The events which took place in April and May of 1994, which led to Sullins' resignation were:

a. There were instances when Defendant Henson parked his car either in Sullins usual parking place or one parking spot up. (Deposition of Sullins at 38).

b. When Sullins would go to the Junior Chamber lunchroom to read newspapers, Henson would walk back and forth in front of a glass partition and grin at her and act like he was taking notes on her. He would also go into the lunchroom and talk to people in the lunchroom. (Deposition of Sullins at 40).

c. Sullins received anonymous phone calls. (Deposition of Sullins at 41).

d. Sullins received an anonymous call from someone who said he found some obscene comments about her in the Tulsa International Airport restroom. (Deposition of Sullins at 46).

61. Sullins does not recall that anything occurred in March of 1994, which led to her resignation. (Deposition of Sullins at 46-47).

62. Sullins filed a charge with the Equal Employment Opportunity Commission and the Oklahoma Human Rights Commission on February 21, 1995. (Paragraph 7 of complaint).

II.
PLAINTIFF'S RESPONSE TO DEFENDANT'S STATEMENT OF UNCONTROVERTED FACTS

Sullins admits the facts set out in Defendant Junior Chamber's motion in paragraphs numbered 1-26. Sullins admits the facts set out in paragraphs numbered 27-33, evidencing the respective memos are attached to the Junior Chamber's motion. Sullins admits the facts set out in paragraphs numbered 34-62. While these facts alleged by the Junior Chamber may be uncontroverted, these facts do not all go to support the material or relevant issues of this case, nor do they support the granting of summary judgment. There exist genuine issues of material fact which preclude the granting of summary judgment in this case.

III.
MATERIAL FACTS AS TO WHICH A GENUINE ISSUE EXISTS

Despite the assertions of the Junior Chamber, the following material facts remain controverted, and at issue, and preclude the grant of summary judgment:

A. Henson's Conduct

1. Great animosity and strife had developed, by late 1993, and early 1994, between Pat DeCorte ("DeCorte"), Sullins' boyfriend, and Henson, Lawson's good friend, concerning Sullins. Henson was upset about it, angry about it, and voiced his concerns to Lawson. [Deposition of Stephen Lawson, 3-17-95, pp.73-74.[1]]

[1]The relevant pages of Stephen Lawson's deposition are attached as Exhibit "1".

2. In January, 1994, one month before DeCorte's termination, Henson was again complaining to Lawson over Sullins breaking up with him and beginning to date DeCorte again. [Deposition of Stephen Lawson, 3-17-95, p.83.]

3. In January, 1994, Henson was despondent over the situation with Sullins dating DeCorte. [Deposition of Stephen Lawson, 3-17-95, pp.83 and 87-88.]

4. Henson took nude, pornographic pictures of Sullins. [Deposition of Mark Henson, 3-13-95, p.66, ln.2-4.[2]]

5. In January, 1994, Henson threatened Sullins that if she stopped dating him he would show the pornographic photo he had taken of Sullins to various other individuals. [Deposition of Cathy Sullins, 11-1-95, p.53, ln.11-24; p.212, ln.16-p.213, ln.6.[3]]

6. At the Ten Outstanding Young Americans Congress dance in January, 1994, Henson threatened to show the pornographic photo to anyone Sullins danced with that night. [Deposition of Cathy Sullins, 11-1-95, p.55, ln.1-22.]

7. Henson told Sandi Vacante ("Vacante") that he took nude photographs of Sullins and then distributed them in the Tulsa airport, at Sullins' apartment complex, and also gave copies to Lawson and others at the Junior Chamber. [Deposition of Sandi Vacante, 6-1-95, p.70, ln.13-p.71, ln.4.[4]]

8. Henson told Vacante that he personally placed the nude photographs of Sullins in the men's bathroom at the Tulsa airport. [Deposition of Sandi Vacante, 6-1-95, p.71, ln.5-9.]

9. Henson told Vacante that he glued a nude photograph of Sullins on her apartment front door, and placed other nude photos of Sullins on people's cars. [Deposition of Sandi Vacante, 6-1-95, p.71, ln.10-16.]

10. Henson told Vacante that he left lingerie hanging on Sullins' front door knob. [Deposition of Sandi Vacante, 6-1-95, p.71, ln.16-p.72, ln.20.]

11. Lawson spoke with Henson about his conduct towards Sullins in a meeting on February 21, 1994; two days before DeCorte's termination and one day before the discovery of marijuana in DeCorte's office. [Deposition of Stephen Lawson, 3-28-95, pp.139-145.]

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[2]The relevant pages of Mark Henson's deposition are attached as Exhibit "2".

[3]The relevant pages of Cathy Sullins' deposition are attached as Exhibit "3".

[4]The relevant pages of Sandi Vacante's deposition are attached as Exhibit "4".

B. Lawson's Conduct

12. Sullins was transferred out of her job as the senior administrative associate to the executive vice-president, to a job in the meetings department, as a result of "an extremely derogatory evaluation" given by Lawson. [Deposition of Cathy Sullins, 11-1-95, p.15, ln.22 -p.16, ln.24.]

13. Lawson, while attending a Junior Chamber seminar, walked into Sullins' hotel room while she was wearing only a towel around her, and thought it was humorous. [Deposition of Stephen Lawson, 3-17-95, pp.109-113.]

14. Lawson fired DeCorte in February, 1994, this was immediately after Henson had threatened Sullins that if she stopped dating Henson and went back to DeCorte, that "he would become my [Sullins] worst f**king nightmare at work." [Deposition of Cathy Sullins, 11-1-95, p.93, ln.7-12.]

15. Lawson wanted to terminate DeCorte because Lawson wanted to date DeCorte's girlfriend, Cathy Sullins, who was also Lawson's executive assistant. [Deposition of Robert Patrick DeCorte, 3-10-95, pp.17-18.[5]]

16. Lawson once told Sullins, "that he would rather I [Sullins] make a thousand f**k-ups and smile at him [Lawson] more." [Deposition of Cathy Sullins, 11-1-95, p.107, ln.24-p.108, ln. 13.]

17. Lawson told Sullins, in February, 1994, that Henson had shown an executive board member of the Junior Chamber the pornographic photo of Sullins, that Henson had taken. [Deposition of Cathy Sullins, 11-1-95, p.49, ln.16-24.]

18. Henson told Vacante that Lawson wanted to get rid of Sullins, but the Junior Chamber did not have reason enough to fire her. [Deposition of Sandi Vacante, 6-1-95, p.72, ln.21-p.73, ln.17.]

19. Sullins objected to working for Lawson in September, 1994, because it was uncomfortable having to "turn down a boss who asked you out socially." [Deposition of Cathy Sullins, 11-1-95, p.62, ln.11-p. 64, ln.17.]

C. Tompkins' Conduct

20. Tompkins entered Sullins' room at the World Congress of Junior Chamber International in Hong Kong, in November of 1993, put his arms around Sullins and gave her a hug before kissing her. [Deposition of Cathy Sullins, 11-1-95, p.113, ln.2-9.]

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[5]The relevant pages of Robert Patrick DeCorte's deposition are attached as Exhibit "5".

D. Sullins' Treatment For Emotional Distress

21. Sullins initially sought medical treatment from a psychologist, Dr. Marion Sigurdson, on two or three occasions to obtain treatment for her emotional distress. Later, Sullins was referred to Dr. Chelf, who prescribed anti-depressants to Sullins. [Deposition of Cathy Sullins, 11-1-95, p.120, ln.25-p.121, ln.25.]

22. Sullins was told that she was suffering such "a severe depression that counseling would be ineffective until I [Sullins] had medication." [Deposition of Cathy Sullins, 11-1-95, p.122, ln.16-20.]

23. Sullins could not take the medications prescribed to her, and the medical bills for counseling became so expensive, that she had to discontinue her treatment. [Deposition of Cathy Sullins, 11-1-95, p.122, ln.21-p.123, ln.3.]

24. Sullins continues to suffer "severe depression" which has been "debilitating." [Deposition of Cathy Sullins, 11-1-95, p.125, ln.6-18.]

E. The Junior Chamber's Knowledge of Sullins' Sexual Harassment

25. Sullins first began complaining to Lawson about Henson's conduct in January, 1994. [Deposition of Stephen Lawson, 3-17-95, p.118, ln.2-25.]

26. Lawson recalls receiving memos from Sullins periodically detailing her complaints regarding Henson. [Deposition of Stephen Lawson, 3-17-95, p.124, ln.10-25.]

27. Sullins had verbally indicated to Lawson that she was physically afraid of Henson. [Deposition of Stephen Lawson, 3-17-95, p.12-23.]

28. In a January 19, 1994, meeting with Henson, Lawson, and Matt Shapiro, Sullins informed her supervisor of Henson's incidences of threats, blackmail, stalking and harassment. [Deposition of Cathy Sullins, 11-1-95, p.126, ln.12-24.]

29. Sullins later sent additional memos to her superiors, regarding Henson's behavior, on January 27, February 4, March 30, April 18, April 29, and May 2, 1994. [Deposition of Cathy Sullins, 11-1-95, p.131, ln.23-p.132, ln.17; p.136, ln.11-20; p.137, ln.24-p.138, ln.3; p.149, ln.2-12.]

30. Sulllins voiced her continuing concerns about Henson, regarding Henson's harassment and the fact no action had been taken to stop Henson from continuing the harassment, at a meeting held on August 2, 1994, with Steve Lawson, Carl Hall, Cathy Sullins, and Maynard Ungerman. [Deposition of Cathy Sullins, 11-1-95, p.139, ln.10-p.141, ln.11.]

31. In her memorandums, Sullins endeavored to make the Junior Chamber aware of the harassment from Henson, and her concern for her personal safety. [Deposition of Cathy Sullins, 11-1-95, p.148, ln.12-24.]

32. Henson never received any kind of reprimand, in writing or orally, from any of his superiors at the Junior Chamber relative to his conduct with Cathy Sullins. [Deposition of Mark Henson, 3-13-95, p.93, ln.24-p.94, ln.3.]

33. No evaluation of Henson reflected that the Junior Chamber recognized any of this conduct needed correction.

F. <u>The Junior Chamber's Knowledge of Employees' Sexual Harassment</u>

34. Matthew Shapiro ("Shapiro") was national president of the Junior Chamber from July 1, 1993, through June 30, 1994, and later became Chairman of the Executive Board. [Deposition of Matthew Shapiro, 1-29-96, p.11, ln.11-20.[6]]

35. After his term as president, Shapiro was informed of sexual harassment complaints by Junior Chamber employees Pam Bruns and Jamie Wind. [Deposition of Matthew Shapiro, 1-29-96, p.25, ln.3-p.27, ln.19.]

36. Shapiro is aware that Jamie Wind was complaining she had been sexually harassed by Steve Lawson. [Deposition of Matthew Shapiro, 1-29-96, p.31, ln.13-18.]

37. Shapiro personally discussed Jamie Wind's sexual harassment complaint with then Junior Chamber president, Gary Tompkins, in July, 1994. [Deposition of Matthew Shapiro, 1-29-96, p.27, ln.1-9.]

38. Shapiro asked president Tompkins to investigate Wind's sexual harassment complaint, but Shapiro does not know if any action was ever taken. [Deposition of Matthew Shapiro, 1-29-96, p.36, ln.2-9.]

THE UNCONTROVERTED FACTS

The Junior Chamber's opening brief sets forth 62 paragraphs of material facts as to which no genuine issue exists. Sullins admits the truth of these facts. While not controverting the Junior Chamber's Statement, Sullins sets forth 38 additional facts which she contends remain at issue and preclude summary judgment. For the purposes of its motion the Junior Chamber will assume the truth of the additional facts.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

IN RE:	)	
	)	
RAY CORBIN FREENY, et al.	)	
	)	
Debtors.	)	
	)	
CONSOLIDATED NUTRITION, L.C.,	)	
	)	
Appellant,	)	
	)	
vs.	)	**CASE NO. 96-C-72-B**
	)	
SCOTT P. KIRTLEY, Trustee,	)	
	)	
Appellee.	)	

ORDER

Now before the Court is an appeal from the United States Bankruptcy Court for the Northern District of Oklahoma. At issue before this Court is United States Bankruptcy Judge Mickey D. Wilson's granting of a Motion For Summary Judgment filed by Scott P. Kirtley (Trustee), Trustee for Debtors, Roy Corbin Freeny and Donna L. Freeny (Debtors). The Order granting summary judgment, filed October 10, 1995, found that a payment of $14,729.45 by Debtors to Consolidated Nutrition, L.C., formerly AGP, L.P. d/b/a Supersweet Feeds, (Supersweet) was a voidable preferential transfer. Appellant/Defendant, Supersweet, appeals that decision. For the reasons discussed below, the Bankruptcy Court's decision is **AFFIRMED.**

STATEMENT OF FACTS

Debtors, who were farmers, began the first of three major series of transactions with Supersweet in 1993. On April 20, 1993, Debtors executed a Feeder Finance Credit Application

and Agreement for a line of credit in the amount of $15,500.00 to buy feed. The agreement provided that each credit purchase must be evidenced by a promissory note and/or delivery invoice. Repayment was due on November 1, 1993. During the time period May 1993 through August 1993, Debtors executed promissory notes under the April 20, 1993 agreement. As agreed, on November 1, 1993, Debtors paid the full amount of the outstanding promissory notes to Supersweet.

On November 10, 1993, Debtors executed a second Feeder Finance Credit Application and Agreement for a line of credit of $19,500.00. The agreement provided that each credit purchase must be evidenced by a promissory note and/or delivery invoice. The repayment under this agreement was due June 10, 1994. That due date was later extended to October 10, 1994 by agreement between Debtors and Supersweet.[1] During the time period December 1993 through March 7, 1994, four promissory notes under the November 10, 1993 agreement were executed for a total value of $19,499.85.

On March 15, 1994, before the original repayment due date on the second agreement, Debtors executed a third Feeder Finance Credit Application and Agreement for a line of credit in the sum of $20,000.00. Again, the agreement provided that each credit purchase must be evidenced by a promissory note and/or delivery invoice. Three credit purchases were made under

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[1]This extension was not made known to the Bankruptcy Court until after the entry of its October 10, 1995 Order granting Trustee's Motion For Summary Judgment. It was the basis of Supersweet's Motion For Relief From Judgment filed October 18, 1995 which claimed that the extension of the due date on the second agreement was material to the decision of the court and precluded entry of judgment as a matter of law against Supersweet. The Bankruptcy Court's Order of November 13, 1995 clarified the facts involving the due date on the second agreement but ruled that the extension did not affect its decision and held that the Trustee is still entitled to judgment as set forth in its October 10, 1995 Order.

the March 15, 1994 agreement for a total of $9,856.07. The repayment due date on this agreement was October 10, 1994.

No payments were made under either the second or third agreement until October 18, 1994. On that date, Debtors paid $14,729.45 to Supersweet by personal check. The check cleared Debtors' bank account on October 24, 1994. The payment was applied to purchases made under the second (November 10, 1993) agreement.

On January 3, 1995, Debtors filed their voluntary petition for relief under 11 U.S.C. Chapter 7 (Ch.7) in the United States Bankruptcy Court for the Northern District of Oklahoma.

On May 12, 1995, Trustee filed his "Complaint" with the Bankruptcy Court alleging that the payment of October 18, 1994 constituted a preferential transfer, avoidable under 11 U.S.C. § 547(b). Supersweet's Answer admitted the payment but denied the existence of the other elements of a voidable preferential transfer and asserted an affirmative defense that the transfer was made in the ordinary course of business under 11 U.S.C. § 547(c)(2).

Trustee filed his Motion For Summary Judgment on September 5, 1995, stating the history of the business transactions between Debtors and Supersweet as uncontroverted facts. Trustee asserted that the payment of $14,729.45 by Debtors to Supersweet was for an antecedent debt, for the benefit of a creditor, was made while Debtors were insolvent and within 90 days of the filing of the Bankruptcy Petition and that it allowed Supersweet to receive more than it would have received had the transfer not been made. In support of his motion, Trustee submitted promissory notes and agreements and Supersweet's statements showing that the $14,729.45 payment was applied against the balance owing on the November 10, 1993 (second) agreement. Supersweet opposed summary judgment, asserting that Debtors were solvent on the date the payment was

made and that such payment was made in the ordinary course of business and, therefore, did not meet all the elements required for a *prima facie* showing of a voidable preference.

The Bankruptcy Court's Order for Summary Judgment was entered on October 10, 1995 and confirmed in its Order of November 13, 1995.

STANDARD OF REVIEW

The Bankruptcy Court's findings of fact are reviewed under the "clearly erroneous" standard. Conclusions of law are reviewed *de novo*. *Bartmann v. Maverick Tube Corp.*, 853 F.2d 1540 (10th Cir. 1988). As this was a legal determination, the standard of review is *de novo*.

LEGAL ANALYSIS

Supersweet claims the Bankruptcy Court erred in finding there existed no material issue of fact that the payment received by Supersweet was not in the ordinary course of business.

There are five conditions under which a trustee is authorized to avoid a transfer. The trustee bears the burden to prove the existence of the conditions. Under 11 U.S.C. § 547(b) the trustee may avoid any transfer of an interest of the debtor in property:

(1) to or for the benefit of a creditor;
(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
(3) made while the debtor was insolvent;
(4) made:
  (A) on or within 90 days before the date of the filing of the petition; or
  (B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
(5) that enables such creditor to receive more than such creditor would receive if --
  (A) the case were a case under chapter 7 of this title;
  (B) the transfer had not been made; and
  (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. § 547(b).

Supersweet has conceded that a transfer was made to a creditor (element 1) and that it was made within 90 days of the date of filing for bankruptcy relief (element 4). Supersweet opposes Trustee's claims that the payment was applied to an antecedent debt (element 2) and that Debtors were insolvent at the time of the transfer (element 3). Supersweet further alleged that the transfer was made in the ordinary course of business which would eliminate element 5 and which Section 547(c)(2) allows as an exception to the avoidable transfer provision.

Under Fed. R. Civ. P. 56(c), applicable here under Bankruptcy Rule 7056, summary judgment is appropriate if the pleadings, affidavits and exhibits show that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552 (1986). A genuine issue of fact exists only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986). To survive a motion for summary judgment, the non-moving party "must establish that there is a genuine issue of material fact . . ." and "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86, 106 S.Ct. 1348, 1455-56 (1986).

Supersweet's statements were attached to Trustee's Motion For Summary Judgment. They clearly evidence that the payment made by Debtors to Supersweet on October 18, 1994 was applied to the amount owed under the second, November 10, 1993, agreement. Supersweet offered no evidence to the contrary. The Bankruptcy Court correctly determined the payment to have satisfied an antecedent debt.

Debtors tendered their check on October 18, 1994. Their Bankruptcy petition was filed on January 3, 1995. Supersweet offered no evidence as to Debtors' solvency on the date of the transfer. According to statute, Debtors were presumed insolvent on and during the 90 days immediately preceding the date of the filing of the petition, 11 U.S.C. § 547(f). Where the transferee offers no evidence regarding solvency, the trustee may rely upon the statutory presumption. *In re Ajayem Lumber Corp.*, 143 B.R. 347 (Bankr. S.D.N.Y. 1992) (citing *WYM, Inc. v. Massachusetts Department of Public Welfare*, 840 F.2d 996 (1st Cir. 1988); *In re Coco,* 67 B.R. 365 (Bankr. S.D.N.Y. 1986)). The Bankruptcy Court correctly determined Debtors to be insolvent at the time of the payment.

It is also clear, from the record, that the payment Supersweet received from Debtors was a greater amount than it would have received had the distribution been made pursuant to Ch. 7. The Trustee's Interim Status Report and the Debtors' Bankruptcy Schedules demonstrate that, under a Ch. 7 distribution, Supersweet would have received less than $14,729.45. Supersweet offered no evidence rebutting Trustee's showing of preferential effect. The Bankruptcy Court made a correct finding of preferential effect.

Supersweet has admitted that payment from Debtors was received on October 18, 1994 in the amount of $14,729.45. However, it asserts that because the payment was only eight days late (the extended due date for repayment was October 10, 1994), it fell within the "ordinary course of business" exception.[2]

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[2]For preference purposes, "transfer" by check is deemed made on the date that the check is honored by the bank; however, for purposes of new value and ordinary course of business defenses to a preference claim, the transfer occurs upon the delivery of the check to the payee, so long as the check was negotiated within a reasonable time thereafter. *Bankr. Code,* 11 U.S.C. §

The necessary elements of an ordinary course of business defense are set forth by statute:

> (c) The trustee may not avoid under this section a transfer --
> (2) to the extent that such transfer was --
> (A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee;
> (B) made in the ordinary course of business or financial affairs of the debtor and the transferee; and
> (C) made according to ordinary business terms.

11 U.S.C. § 547(c)(2). In order to receive the benefit of the ordinary course of business exception to avoidance of preferential transfers, a creditor must satisfy all three conditions of the statutory requirements, separately and independently. See *In re Fred Hawes Organization, Inc.*, 957 F.2d. 239 (6th Cir. 1992). At this point, the burden of proof shifted to Supersweet.

There is no dispute that the debt was incurred in the ordinary course of business between Debtors and Supersweet. Supersweet offered the promissory notes under the third, March 15, 1994, agreement as proof of elements (B) and (C), above and cited *In re Ajayem Lumber Corp.*, 143 B.R. 347 (Bankr. S.D.N.Y. 1992) as authority for its contention that the payment should be determined ordinary in relation to the parties' past practices. In that case, genuine questions of fact arose as to the industry standards which the court could not resolve without an evidentiary hearing. In this case, there are no such questions of fact. Here the decision is based upon the circumstances of the business transactions between the parties, not the standard in the industry. Moreover, the ordinary course of business exception to the trustee's avoiding powers should be narrowly interpreted. *In re Braniff, Inc.*, 154 B.R. 773 (Bankr. M.D. Fla. 1993); *In*

547(b), (c); *In re Ladera Heights Community Hospital, Inc.*, 152 B.R. 964 (Bankr. C.D. Cal. 1993); *In re Global Distribution Network, Inc.*, 103 B.R. 949 (Bankr. N.D. Ill. 1989).

re Industrial Supply Corp., 127 B.R. 62 (M.D. Fla. 1991). While it is correct that "late payments" may be held within the ordinary course of business exception, in this case, Supersweet failed to demonstrate that past practice between the parties allowed for late payments or for partial payments. Debtors and Supersweet executed a written agreement to extend the second agreement's payment due date from June 10, 1994 to October 10, 1994.[3] This demonstrates that late payments were actually "not the norm" and that specific written arrangements were made when a payment was expected beyond the due date. There is no evidence that another agreement to extend the payment due date was made or that late payments had been acceptable in the past without an extension agreement. The payment under the first and only prior transaction between the parties was made in full on the date that it was due.

Supersweet contends that the mere presence of a possible ordinary course of business defense should result in the denial of a motion for summary judgment and cites *In re Calumet Farm, Inc.*, 150 B.R. 403 (Bankr. E.D. Ky. 1992) as its authority. In the *Calumet* case, a fact question existed as to the specifics of the transactions involved. There is no factual issue as to any of the transactions in the instant case. Once a party moving for summary judgment has overcome his burden of showing that there is no basis in the record for findings of fact that might determine a result in favor of the nonmovant, its opponent must introduce more than a scintilla of evidence that there is some doubt as to the material facts. Fed. Rules Civ. Proc., Rule 56; *In re Global*

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[3]Appellant's Brief advised that a copy of that Extension Agreement had been attached as Exhibit "A" to its Motion For Relief From Judgment (App. #10, Ex. A). However, in the record before this Court, there is no such attachment to any of the motions or responses. It is uncontested, however, that such an agreement exists and, in light of the Court's finding, it is referred to in this Order as it is described by Supersweet and acknowledged by Trustee.

Distribution Network, Inc., 103 B.R. 949 (Bankr. N.D. Ill. 1989).

Finally, Supersweet implies that the Bankruptcy Court's previous decision in *In re Curtis*, 38 B.R. 364 (Bankr. N.D. Okla. 1983) precludes summary judgment in the instant case. In *Curtis* the Court stated that summary judgment must not cut off a party's right to have the issues decided at trial and that it is properly granted only where there are no issues to be decided at trial. In this case, there are no conflicts in the evidence, the facts are not disputed and only one reasonable inference can be drawn from the evidence. This Court has reviewed the law and facts in accordance with the applicable standard and has determined that the Bankruptcy Court properly applied the law to the undisputed facts.

Trustee is entitled to judgment in his favor as a matter of law. Accordingly, the Bankruptcy Court is **AFFIRMED**.

DATED this 1ST day of Aug, 19 96.

THOMAS R. BRETT, CHIEF JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MAMIE L. MASON, Plaintiff,	)	
vs.	)	No. 96-C-19B
MARRIOTT INTERNATIONAL, INC., Defendant.	)	(Removed Tulsa County Case No.CJ 95 05303)

JOINT STIPULATION FOR DISMISSAL WITH PREJUDICE

The Plaintiff, Mamie L. Mason, and the Defendant, Marriott International, Inc. jointly stipulate and agree that this case be dismissed with prejudice, each party to bear her or its own costs, expenses and attorneys' fees.

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SR

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE 8-1-96

PAULA COOK,

Plaintiff,

v.

BANK OF OKLAHOMA, N.A., a corporation,

Defendant.

Case No. 95-C-1010-H

FILED

JUL 31 1996

Phil Lombardi, Clerk
U.S. DISTRICT COURT

JOINT STIPULATION FOR DISMISSAL WITH PREJUDICE

Plaintiff Paula Cook and Defendant Bank of Oklahoma, N.A., a national banking association, pursuant to Rule 41(a)(ii) of the Federal Rules of Civil Procedure, hereby jointly stipulate for the dismissal of Plaintiff's Complaint, and all claims asserted or which could have been asserted therein, with prejudice to refiling, each party to bear its respective costs and attorney fees.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LESEA BROADCASTING OF INDIANA, INC., a foreign corporation, d/b/a/ KWHB TV-47,

Plaintiff,

v.

TCI CABLEVISION OF TULSA, INC., a corporation, et al.,

Defendants.

Case No. 93-C-535-H

ORDER

This matter comes before the Court on Defendants' Motion to Dismiss Second Amended Complaint with Prejudice (Docket #55). A hearing in this matter was held on June 27, 1996.

Defendants contend that the Second Amended Complaint, filed on February 15, 1996, fails to state a claim under the applicable requirements of federal and state law. In particular, Defendants assert that Plaintiff has failed to identify the relevant product market allegedly monopolized by Defendants as required by Section 2 of the Sherman Act. 15 U.S.C. § 2. At the hearing, counsel for both parties agreed that the Court's inquiry into whether Plaintiff has properly stated a claim under the federal and state antitrust laws is guided by TV Communications Network, Inc. v. Turner Network Television, Inc., 964 F.2d 1022 (10th Cir.), cert. denied, 506 U.S. 999 (1992).

I.

In Counts One and Two of its second amended complaint, Plaintiff alleges that Defendants violated the Sherman Antitrust Act.

Count One states in part as follows:

> 24. For purposes of Count One, the relevant product markets at issue in this litigation include: (1) the market for capturing the television audience; (2) the market for obtaining television programming; (3) the market for the sale of

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television advertising time; and (4) the market for the sale of television advertising time; and (4) the market for the sale of program time.

25. By the above reference to (1) the market for capturing the television audience in the Tulsa Area, Plaintiff is referring to the fact that Defendants' denial of cable access to TV-47 has effectively deprived TV-47 of the ability to compete for any meaningful share of the television audience in the Tulsa Area.

26. By the above reference to (2) the market for obtaining television programming in the Tulsa Area, Plaintiff is referring to the fact hat Defendants' refusal to carry TV-47 has effectively deprived TV-47 of the ability to meaningful compete to obtain certain programming from independent programmers and syndicators who would rather sell their programming to competitors with cable access, including Defendants, because such competitors can provide greater profits as a result of much greater audience market share from cable coverage.

27. By the above reference to (3) the market for the sale of television advertising time in the Tulsa Area, Plaintiff is referring to the fact that Defendants' refusal to carry TV-47 has effectively deprived TV-47 of the ability to meaningfully compete for advertising revenues because advertisers would rather purchase advertising time from competitors with cable access, including Defendants and the local network-affiliated broadcasters, because such competitors provide the advertiser with a much greater audience and resulting increased sales potential.

28. By the above-reference to (4) the market for the sale of Program time in the Tulsa Area, Plaintiff is referring to the fact that Defendants' refusal to carry TV-47 has effectively deprived TV-47 of the ability to meaningfully compete for the sale of program time because independent programmers would rather buy program time from the competitors of TV-47 who have cable access, including Defendants, since the value of that program time is significantly greater due to the much greater cable television audience size and the resulting greater profit potential to such independent programmers.

Count Two states in part as follows:

45. For the purposes of Count Two, Plaintiff specifically adopts and realleges each and every paragraph of Count One except that the relevant product markets at issue in this litigation include: (1) the market for capturing viewers of religious programmings; (2) the market for obtaining religious programming; (3) the market for the sale of television advertising time on religious programs; and (4) the market for the sale of program time on religious stations.

46. By the above reference to (1) the market for capturing viewers of religious programming, Plaintiff is referring to the fact that Defendants' denial of cable access to TV-47 has effectively deprived TV-47 of the ability to compete for any meaningful share of the television audience for religious programming in the Tulsa Area.

47. By the above reference to (2) the market for obtaining religious programming, Plaintiff is referring to the fact that Defendants' refusal to carry TV-

47 has effectively deprived TV-47 of the ability to meaningfully compete to obtain religious programming from independent programmers and syndicators who would rather sell their religious programming to the Defendants because the Defendants can provide greater profits as a result of much greater audience market share from cable coverage.

48. By the above reference to (3) the market for the sale of television advertising time on religious programs, Plaintiff is referring to the fact that Defendants' refusal to carry TV-47 has effectively deprived TV-47 of the ability to meaningfully compete for revenues from the sale of advertising time on religious programs because advertisers would rather purchase advertising time from the Defendants because the Defendants can provide the advertiser with a much greater audience from cable coverage and resulting increased sales potential.

In sum, Plaintiff alleges that Defendants denied cable access to channel TV-47 and that such alleged denial of access constituted a violation of the antitrust laws. The Court concludes that such bare allegations cannot withstand a motion to dismiss under applicable law.

II.

To prevail on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), a defendant must establish that there is no set of circumstances upon which the plaintiff would be entitled to relief. Jenkins v. McKeithen, 395 U.S. 411 (1969); Ash Creek Mining Co. v. Lujan, 969 F.2d 868, 870 (10th Cir. 1992). For purposes of this analysis, the Court accepts as true all material allegations in the complaint. Associated Gen. Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519, 526 (1983); Ash Creek Mining, 969 F.2d at 870. "[I]f as a matter of law 'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations' a claim must be dismissed." Neitzke v. Williams, 490 U.S. 319, 327 (1989) (quoting Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)).

"Although the modern pleading requirements are quite liberal, a plaintiff must do more than cite relevant antitrust language to state a claim for relief." TV Communications Network, 964 F.2d at 1024. A plaintiff must allege sufficient facts to support a cause of action under the antitrust laws. Id. Conclusory allegations that the defendant violated those laws are insufficient. Id.

Section 2 of the Sherman Act prohibits monopolies in interstate trade or commerce. Conduct violates this section where an entity acquires or maintains monopoly power in such a way as to preclude other entities from engaging in fair competition. United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 389-90 (1956); Instructional Sys. Dev. Corp. v. Aetna Cas. & Sur. Co., 817 F.2d 639, 649 (10th Cir. 1987). In order to prove a monopoly in violation of section 2, a plaintiff must establish: "(1) the possession of monopoly power in the relevant market, and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966); Reazin v. Blue Cross & Blue Shield of Kansas, Inc., 899 F.2d 951, 973 (10th Cir.), cert. denied, 110 S. Ct. 3241 (1990). As noted, Plaintiff must plead facts sufficient to support these elements to survive a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6).

III.

Defendants own the only cable television system in the Tulsa, Oklahoma area. Plaintiff's second amended complaint alleges that Defendants monopolized the Tulsa cable television market by denying Plaintiff cable access for its religious programming. Plaintiff contends that Defendant's refusal to carry TV-47 has effectively deprived TV-47 of the ability to meaningfully compete for audience share, programming material, and advertising dollars. It is settled law, however, that a company does not violate the Sherman Act by virtue of the natural monopoly it holds over its own product. TV Communications Network, 964 F.2d at 1025. Therefore, to the extent that Plaintiff claims that the relevant market is Tulsa cable television, Plaintiff's second amended complaint must fail.[1]

[1] Plaintiff cites no authority and the Court has identified none to support the position that the mere ownership of a cable television system and the refusal to permit access to that system forms the basis for a claim under the antitrust laws.

Moreover, contrary to the clear allegations contained in its second amended complaint, Plaintiff asserts in its brief that "[t]he gravamen of Plaintiff's complaint is not that Defendants own and operate the only cable TV system in the Tulsa area, but that Defendants have unfairly insulated themselves from competition in the operation and management of programming on their own cable channels by exclusion of TV-47." Pl.'s Resp. Br. at 4. This formulation of the "relevant market" in effect ignores the question of relevant market altogether, and thus fails as a matter of law.

Plaintiff further endeavors to define the relevant market by summarizing broadly the operative paragraphs of the second amended complaint, which paragraphs are quoted in their entirety above, and then concluding, "In short, the relevant product market, is the television viewing market and its consequent and necessary operating revenues, particularly for the submarket for religious and local sports programming." The Court concludes that this new definition is inconsistent with the clear allegations in the second amended complaint which, "must stand or fall on [their] own," and, as noted above, are defective as a matter of law. TV Communications Network, 964 F.2d at 1025. Furthermore, articulating the relevant market as "the television viewing market and its consequent and necessary operating revenues" fails to satisfy not only the specific requirements for an antitrust claim under TV Communications Network, but also the general requirements for any claim under Fed. R. Civ. P. 12(b)(6).

III.

In Counts Three and Four of the second amended complaint, Plaintiff contends that Defendants engaged in restraint of trade in violation of state statutory and common law. Counsel for both Plaintiff and Defendants agreed at the hearing that in order to state a claim under state law for restraint of trade, a plaintiff is required to define the relevant market to the same extent and in the same manner required by federal law. Based upon the Court's conclusion above that Plaintiff

has not adequately defined the relevant market under federal law, Plaintiff's state law claims must also fail.

Based upon a careful review of the second amended complaint, the Court concludes that Plaintiff has failed to allege monopoly power in the relevant market. Therefore, Defendants' Motion to Dismiss (Docket #55) is hereby granted.

IT IS SO ORDERED.

This 30th day of July, 1996.

Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

ABED DAMAJ,

Plaintiff,

v.

NO. 94-C-531-M

FARMERS INSURANCE COMPANY, INC., d/b/a FARMERS INSURANCE GROUP OF COMPANIES,

Defendant.

ORDER

The parties have consented to the resolution of this case by a United States Magistrate Judge pursuant to 28 U.S.C § 636(c)(1)&(3). [Dkt. 58]. Any appeal of this case will be to the Tenth Circuit Court of Appeals. In addition, the parties have waived jury trial, agreeing instead to submit their case to the court by way of joint stipulations of fact and the submission of affidavits addressing disputed matters.

United States District Judge Sven Erik Holmes has previously granted summary judgment to Defendant on Plaintiff's bad faith claim and has granted Defendant's motion to strike Plaintiff's claim for punitive damages. [Dkt. 52]. As framed by the parties in their joint stipulations of fact, the remaining issues to be resolved are: "whether the defendant breached its contract of insurance with plaintiff by failing to pay to the plaintiff the fair value of [plaintiff's] stolen van on the date of the loss and the damages, if any, which are to be awarded to Plaintiff." [Dkt. 66, p.1].

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The following are matters about which the parties agree:

(1) Plaintiff's 1989 Chevrolet high-top customized Astro van was stolen on January 8, 1994 and has not been recovered.

(2) The stolen van was equipped with a high top roof, VCR, television, captains chairs, pull out sofa/bed, table spare tire cover, wood trim, special decor lighting, drapes, console with ice chest, AM/FM stereo, special paint, ladder, dual air conditioning system, power steering and brakes, transmission cooler unit, a CB radio and tilt steering.

(3) At the time it was stolen, the van had approximately 85,000 miles on the odometer.

(4) The van was insured by Farmers Insurance Policy No. 129027576. Plaintiff paid an additional premium for coverage of the customization of the van.

(5) Farmers valued the van at $10,000 and on August 4, 1994 issued a check payable to Plaintiff and his attorney in the amount of $9,880.00, the $10,000 value, as determined by Farmers, less deductible of $120.

(6) Farmers has not paid any incidental expenses associated with the loss.

(7) The policy limits recovery for loss of clothing or luggage to $200 when such items are lost in conjunction with the theft of the vehicle.

The specific matters to be determined by the Court are: (1) the value of the stolen van; (2) the value of covered personal property lost in the theft of the van; and (3) whether Plaintiff can recover his loan expenses incurred as a result of Defendant's breach of contract.

CONTRACT PROVISIONS

Part IV of the Policy entitled "DAMAGE TO YOUR CAR" contains the following provisions relevant to this case:

> **Limits of Liability**
> Our limits of liability for **loss** shall not exceed the lowest of:
> 1. The *actual cash value* of the stolen or damaged property.
> 2. The amount necessary to repair or *replace* the property or parts *with other of like kind and quality.*
>
> * * *
>
> **Payment of Loss**
> We will pay the **loss** in money or repair or replace damaged or stolen property. . . . [bold emphasis in original, italics added].

[Dkt. 59, Exhibit A, numbered page 4].[1] The policy clearly states that in case of loss or damage to Plaintiff's van, Farmers will pay the lower of the *actual cash value* of the van or the amount necessary to *replace the property with [an]other of like kind and quality.*

EVALUATION OF STOLEN VAN

Farmers submitted the affidavit of Ron Banks, the claims representative handling Plaintiff's theft claim. Mr. Banks testified that he contacted used car managers at four local dealerships and "[a]s a result of my conversations with used car sales managers, I gave the insured the highest estimate, and determined the actual cash value of the vehicle to be $10,000.00." [Dkt. 66, Exhibit H, ¶¶ 4-5].

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[1] A copy of the policy is also attached as Exhibit A to the Joint Stipulations of Fact, Dkt. 66. However, the pages were copied out of sequence, making it difficult to follow. Therefore all citations to the policy refer to the copy appended to Dkt. 59.

Farmers also offered the affidavit of Bruce Jenkins, used car sales manager for Chalmers Chevrolet in Tulsa, Oklahoma. He testified that based on his knowledge, experience and training, a van like the Plaintiff's stolen van would retail "for approximately $9,500.00-10,000.00." He also testified that on May 22, 1995 there was a "1990 Hi-top Conversion Van on the sales lot with 80,000 miles on it that retailed for approximately $10,995.00." [Dkt. 66, Exhibit I, ¶ 3].

Plaintiff testified, via affidavit, that during negotiations with Farmers over the value of the stolen van, he located:

> "a Chevrolet van at Riverside Chevrolet which had been driven fewer miles but was one year older, was not in as good condition as my van, was not equipped with either a VCR or a CB Radio, and was priced at $15,900.00.

[Dkt. 69, p.2, ¶ 8].

Plaintiff has submitted the affidavit of James Little, president of Independent Automotive Damage Appraisers to establish the value of his van at the time it was stolen. [Dkt. 66, p.5, ¶ I-F; Dkt. 68]. In his affidavit, Mr. Little swears that in his opinion "on January 8, 1994, the actual cash value of Mr. Damaj's van, or the cost to replace that van, was the sum of $12,105.00." [Dkt. 68, p.2, ¶ 8].

In determining the appropriate value for the van under the contract, the Court rejects the affidavit of Bruce Jenkins as establishing the value of the van at either $10,000 or $10,995. The only information provided concerning the $10,995 van is its year (1990), its mileage (80,000), and that it is a high top conversion van. Since

Mr. Jenkins did not provide information as to its make, model, features and condition, the Court cannot determine that it was of like kind and quality as specified in the policy. In addition, Mr. Jenkins's affidavit disclosed that his evaluation is only approximate. The Court relies on the more detailed affidavit of James Little as establishing the actual cash value of Plaintiff's stolen van at $12,105.00. Mr. Little's affidavit refers to the specific features and condition of the van and gives an opinion as to a precise, not approximate amount.

The Court finds that, based on Mr. Little's affidavit, the value of Plaintiff's van was $12,105.00. Under the contract of insurance $12,105.00, less the $9,880.00 already paid, and less $120.00 deductible or $2,105.00 is the sum due under the insurance contract for the theft loss of Plaintiff's van.

PERSONAL PROPERTY

Plaintiff claims that when it was stolen, the van contained personal property with a value of $721.55. [Dkt. 69, p.2, ¶ 7]. Plaintiff acknowledges that recovery under the policy is limited to $200.00. [Dkt. 66, p.4, ¶ I-A]. Farmers has submitted no evidence or argument to dispute coverage for the personal property lost in the stolen van. Accordingly the Court finds that Farmers is liable to Plaintiff in the amount of $200.00 for loss of personal property covered under the policy.

LOAN EXPENSE

The final matter to be determined is whether Plaintiff can recover an additional $600.00 which amount represents attorney's fees and associated costs paid to Guaranty Federal Bank, the holder of the security interest in the van at the time of its

theft. Plaintiff claims these fees were incurred as a result of Farmers's failure to timely pay the claim for the loss of his van. Farmers has submitted correspondence between Plaintiff, his attorney and the bank which outlines the bank's efforts at collection of the indebtedness secured by the stolen van. Although Farmers argues it is relieved of the obligation to pay the $600.00 because Plaintiff failed to mitigate his damages by paying past-due loan amounts or by advising the bank that a claim could be made directly against the insurance company, the Court decides the issue on another ground.

While not cited by either Plaintiff or Defendant, the Court notes that under 23 O.S. § 22, damages for the breach of an obligation to pay money only is deemed to be the amount due by the terms of the obligation, with interest thereon. Since District Judge Holmes has removed the issues of bad faith and punitive damages, the case presently is one for the payment of money only. Plaintiff is, therefore, limited in his damages by the terms of the obligation. The claimed damages of $600 are not within the terms of the obligation. The Court, therefore, denies recovery of this amount to Plaintiff.

CONCLUSION

In sum, the Court finds Defendant, Farmers Insurance Company, Inc. d/b/a Farmers Insurance Group of Companies, breached its contract of insurance with Plaintiff, Abed Damaj. Damages for the breach are $2,105.00, additional value of the stolen van. In addition, the policy provides $200.00 in coverage for loss of personal

property, which sum is due Plaintiff and has not been paid. The total amount of the award to Plaintiff is $2,305.00 plus interest as allowed by law.

SO ORDERED this 29th day of July, 1996.

Frank H McCarthy

FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROSE ANNE YOAKUM,

Plaintiff,

vs.

ST. JOHN MEDICAL CENTER, INC., a non-profit corporation incorporated in the State of Oklahoma,

Defendant.

Case No. 95-C-963-BU

ADMINISTRATIVE CLOSING ORDER

The Court, after consultation with counsel in this case, finds that this action should be administratively closed during the pendency of the proceedings before the Supreme Court in regard to the petition for writ of certiorari filed in McWilliams v. Fairfax County Bd. of Supervisors, 64 USLW 3839 (June 10, 1996)(No. 95-1983). It is therefore ordered that the Clerk administratively terminate this action in his records pending resolution of the proceedings in the Supreme Court.

The parties are DIRECTED to notify the Court in writing of the resolution of the Supreme Court proceedings so that the Court may reopen this matter, if necessary, to obtain a final determination of this litigation.

ENTERED this 31 day of July, 1996.

Michael Burrage

MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT
IN AND FOR THE NORTHERN DISTRICT OF OKLAHOMA

CARLTON ENTERPRISES, INC., d/b/a DON CARLTON HONDA, and DON CARLTON GMC TRUCK, INC., d/b/a CAR CITY,

Plaintiffs,

v.

DEALER COVER, INC., SPECIAL RISK MARKETING, INC., WILLIS CORROON SPECIALTY RISKS, INC., STEWART SMITH SPECIALTY RISKS, INC., GLOBAL SPECIAL RISKS, INC., UNDERWRITERS AT LLOYDS' LONDON, INDEMNITY MARINE ASSURANCE COMPANY LIMITED, COMMERCIAL UNION ASSURANCE COMPANY PLC, THE YORKSHIRE INSURANCE COMPANY LTD., PHOENIX ASSURANCE PLC, SPHERE DRAKE INSURANCE COMPANY PLC, DAI-TOKYO INSURANCE COMPANY (U.K.) LTD, PER SPHERE DRAKE INSURANCE PLC 'NO. 2' A/C/, OCEAN MARINE INSURANCE COMPANY LTD., CORNHILL INSURANCE PLC, ALLIANZ INTERNATIONAL INSURANCE COMPANY LTD., PER CORNHILL J A/C, NORTHERN ASSURANCE COMPANY LTD. 'NO. 6' A/C/, NORWICH UNION FIRE INSURANCE SOCIETY LTD. NO. 1 'M', A/C/ PER MARITIME INSURANCE COMPANY LTD., and COLONIA INSURANCE COMPANY (UK) LTD.,

Defendants.

Court No. 95-C-1055-BU

ORDER

Plaintiffs, Carlton Enterprises, Inc., d/b/a Don Carlton Honda, and Don Carlton GMC Truck, Inc., d/b/a Car City, have moved for dismissal of the above-captioned matter with prejudice as against the Defendant, Ronald H. Hutton.

The court having considered said pleadings on file dismisses the existing case against Defendant, Ronald H. Hutton, with prejudice to the refiling of same.

s/ MICHAEL BURRAGE

THE HONORABLE MICHAEL BURRAGE

CARLTON\MTD.ORD

UNITED STATES DISTRICT COURT
IN AND FOR THE NORTHERN DISTRICT OF OKLAHOMA

CARLTON ENTERPRISES, INC., d/b/a DON CARLTON HONDA, and DON CARLTON GMC TRUCK, INC., d/b/a CAR CITY,

Plaintiffs,

v.

DEALER COVER, INC., SPECIAL RISK MARKETING, INC., WILLIS CORROON SPECIALTY RISKS, INC., STEWART SMITH SPECIALTY RISKS, INC., GLOBAL SPECIAL RISKS, INC., UNDERWRITERS AT LLOYDS' LONDON, INDEMNITY MARINE ASSURANCE COMPANY LIMITED, COMMERCIAL UNION ASSURANCE COMPANY PLC, THE YORKSHIRE INSURANCE COMPANY LTD., PHOENIX ASSURANCE PLC, SPHERE DRAKE INSURANCE COMPANY PLC, DAI-TOKYO INSURANCE COMPANY (U.K.) LTD, PER SPHERE DRAKE INSURANCE PLC 'NO. 2' A/C/, OCEAN MARINE INSURANCE COMPANY LTD., CORNHILL INSURANCE PLC, ALLIANZ INTERNATIONAL INSURANCE COMPANY LTD., PER CORNHILL J A/C, NORTHERN ASSURANCE COMPANY LTD. 'NO. 6' A/C/, NORWICH UNION FIRE INSURANCE SOCIETY LTD. NO. 1 'M', A/C/ PER MARITIME INSURANCE COMPANY LTD., and COLONIA INSURANCE COMPANY (UK) LTD.,

Defendants.

Court No. 95-C-1055-BU

ORDER

Plaintiffs, Carlton Enterprises, Inc., d/b/a Don Carlton Honda, and Don Carlton GMC Truck, Inc., d/b/a Car City, by and through their attorney of record, Tony M. Graham of the law firm Feldman, Franden, Woodard, Farris & Taylor, and the Defendants,

Stewart Smith Specialty Risks, Inc., Willis Corroon Specialty Risks, Inc., and Special Risks Marketing, Inc., by and through their attorney of record, Malcolm E. Rosser, IV of the law firm Crowe & Dunlevy, have jointly moved this court for an order of dismissal with prejudice relating to all claims existing between said parties.

The court hereby grants said Motion. It is therefore ordered that all claims by Plaintiffs, Carlton Enterprises, Inc., d/b/a Don Carlton Honda, and Don Carlton GMC Truck, Inc., d/b/a Car City, against the Defendants, Stewart Smith Specialty Risks, Inc., Willis Corroon Specialty Risks, Inc., and Special Risks Marketing, Inc., and any claims by Defendants, Stewart Smith Specialty Risks, Inc., Willis Corroon Specialty Risks, Inc., and Special Risks Marketing, Inc., against the Plaintiffs, Carlton Enterprises, Inc., d/b/a Don Carlton Honda, and Don Carlton GMC Truck, Inc., d/b/a Car City, are hereby dismissed with prejudice.

s/ MICHAEL BURRAGE

THE HONORABLE MICHAEL BURRAGE

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